Supreme Court, U.S.
FILED

031032 JAN 20 2004

No.

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the unprecedented decision of a Ninth Circuit Panel to recuse a District Court Judge based solely on a single ruling in the case selecting the location for retrial, and reversing without regard to any standard of review an order by a randomly assigned, independent District Court Judge denying plaintiffs' recusal motion, constitute such a departure from "the accepted and usual course of judicial proceedings" as to warrant the exercise of this Court's supervisory powers by summary reversal?

2. Does departure from "the accepted and usual course of judicial proceedings" by a panel assignment contrary to Ninth Circuit Rules of Court, a decision that usurps the statutory power [28 U.S.C. § 1404(c)] of the District Court to select the situs for trial, and a failure – or refusal – to circulate defendants' petition for rehearing *en banc* warrant the exercise of the supervisory powers of this Court?

PARTIES TO THE PROCEEDING

Petitioners

County of Humboldt, Sheriff Dennis Lewis, Chief Deputy Gary Philp, and City of Eureka.

Respondents

Molly Burton, Vernell "Spring" M. Lundberg, Michael McCurdy, Eric Samuel Neuwirth, Maya Portugal, Lisa Maria Sanderson-Fox, Jennifer Schneider, Terri Slanetz and Noel Tendick. Headwaters Forest Defense is no longer a party to this action.

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PETITION FOR WRIT OF CERTIORARI AND REQUEST FOR SUMMARY REVERSAL

The County of Humboldt, the City of Eureka, Sheriff Dennis Lewis, and Chief Deputy Gary Philp petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit in this case, and further request that this Court summarily reverse the order and reinstate the orders of the District Court, denying plaintiffs' recusal motion and motion to change the situs of trial.

OPINIONS BELOW

The order of the Court of Appeals is attached as Appendix ("App.") A. This order follows the prior decision of the Ninth Circuit, *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), this Court's grant of Certiorari and Remand, 122 S.Ct. 24, and the Ninth Circuit's previous decision vacated by this Court, reported at 240 F.3d 1185.

JURISDICTION

The order of the Court of Appeals was entered on September 2, 2003. On October 22, 2003, the Court of Appeals denied petitioners' timely petition for rehearing and for rehearing *en banc*. App. B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a suit for damages under Title 42, United States Code section 1983, asserting excessive force in violation of the Fourth Amendment to the United States Constitution.

The order of the Court of Appeals involves application of the federal recusal statutes, 28 U.S.C. §144 and 28 U.S.C. §455, and venue statutes 28 U.S.C. §84(a) and 28 U.S.C. §1404(c).

STATEMENT

Plaintiffs filed suit against two public entities and law enforcement officials for violation of 42 U.S.C. §1983, claiming that the non-injurious use of pepper spray (Oleoresin Capsicum or "OC") to effect their lawful arrests constituted excessive force.

The incidents and resulting litigation have been widely-publicized. Plaintiffs are self-proclaimed environmental activists, and members of EarthFirst!, a world-wide movement which advocates and practices criminal actions ("direct actions") to advance purported environmental causes.[1] During each incident, the plaintiffs "locked down" in twenty-five pound steel cylinders to resist and delay their lawful arrests.

In each incident, the on-scene officer in charge determined that the tactical use of OC was the safest means of accomplishing the arrests under the circumstances. In

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[1] EarthFirst! and similar groups were involved in the World Trade Organization protests in Seattle and Washington, D.C. *See*, for example, December 13, 1999, *Newsweek*, "The Battle of Seattle;" December 13, 1999, *Time*, Vol. 154, No. 24, "Anarchy In Seattle;" April 24, 2000, *Newsweek*, "Getting Ready For Seattle II," regarding seizure of a carload of "lock boxes" (such as the "black bears" used here), at p. 40; *and see* http://www.protest.net.

each case, the officers pleaded with the activists to release from the steel sleeves, and warned that if they did not comply, OC would be used. In spite of the repeated warnings, each plaintiff steadfastly refused to comply, and OC was used.

Following factual discovery, defendants moved for summary judgment. The Court, Judge Vaughn Walker of the Northern District of California, granted qualified immunity to the individual defendants, with the exception of the Humboldt County Sheriff and his Chief Deputy, and denied the motion in all other respects. The case does not implicate the First Amendment rights of plaintiffs – all such claims were dismissed following discovery – and Headwaters Forest Defense voluntarily dismissed *all* of its purported causes of action early in the proceedings.

Trial commenced in San Francisco in the summer of 1998. At the conclusion of the evidence, the remaining individual (policy maker) defendants were dismissed based on qualified immunity, and the case was submitted to the jury as to the entity defendants. After deliberation, the jury announced that it was deadlocked, and the court declared a mistrial. Defendants then moved for entry of judgment as a matter of law under Federal Rules of Civil Procedure, Rule 50.

The District Court granted the Rule 50 motion, concluding that: "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs." See *Headwaters Forest Defense v. County of Humboldt,* 1998 WL 754575 (N. D. Cal. 1998).

The Ninth Circuit (Pregerson, Fletcher, W., and Bright) reversed the judgment. *Headwaters Forest Defense v.*

County of Humboldt, 240 F.3d 1185 (9th Cir. 2000). No error was assigned to the District Court, other than the finding that purported disputes in "historical facts" prevented the granting of judgment as a matter of law.[2] Nothing in the proceedings of the first trial or the decision of the District Court prompted the appellate panel to suggest recusal.

The United States Supreme Court granted review and vacated the opinion with instructions to reconsider in light of *Saucier v. Katz,* 533 U.S. 194 (2001).

The panel then reconsidered the matter without further briefing or oral argument, and issued another opinion, again reversing and remanding to the District Court. *Headwaters II,* 276 F.3d 1125 (9th Cir. 2002).

Defendants then filed a second petition for certiorari, which was denied. 123 S.Ct. 513 (2002).

At a January, 2003, case management conference, Judge Walker indicated his intent to hold the retrial in Eureka, the seat of Humboldt County, where all the underlying events occurred and where virtually all the parties and witnesses reside.[3] The judge also invited plaintiffs to file a motion regarding the trial location at this conference.

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[2]A question one panel member termed "a close one" in a concurring opinion later deleted. Compare 211 F.3d 1121 and 240 F.3d 1185.

[3]The panel order describes the choice of situs as being made *sua sponte.* Defendants urged that trial in Eureka was appropriate before the first trial because of the burden and expense associated with the number of officers that must otherwise testify in San Francisco – located 275 miles to the south of Eureka. The federal courtroom in Eureka was unavailable at that time. It became available for civil trials during the intervening period between the first trial and scheduled retrial. (See fn. 9, *infra.*)

Following this conference, plaintiffs' attorney publicly stated the intention to wage a "political trial" against the defendants.[4] Later, one of the plaintiffs proclaimed: "I believe that our pepper spray trial needs an international forum, and that will happen if we get a trial in San Francisco."[5]

Meanwhile, cross-motions for summary judgment were heard by the Court on March 27, 2003, and were denied.

On April 14, 2003 – more than *five years* after his assignment to the case – plaintiffs filed a motion to recuse Judge Walker pursuant to 28 U.S.C. § 144 and 28 U.S.C. § 455(a), claiming bias. The motion was accompanied by an affidavit of one of the plaintiffs pursuant to section 144, explaining the reasons for the claimed bias, to wit, the District Court's decision following the first trial granting judgment as a matter of law to the defendants, and the decision to hold the trial in Eureka. App. F.

Plaintiffs concurrently filed a motion requesting that the trial be held in San Francisco – located 275 miles south of Eureka, the parties, and the subject incidents. Judge Walker immediately ordered that the recusal motion be referred to the court clerk for random assignment to another judge. App. C.

Plaintiffs' recusal motion was then assigned to Northern District Judge Phyllis Hamilton, who issued an order denying the motion on April 23, 2003. App. D. Judge Hamilton concluded that "[p]laintiffs have not estab-

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[4] *San Francisco Examiner*, January 24, 2003.

[5] Plaintiff Vernell "Spring" Lundberg, as reported on plaintiffs' website, www.nopepperspray.org.

lished the appearance of bias, let alone actual bias." Judge Hamilton also noted that Eureka was expressly designated as a proper trial location in the Northern District by 28 U.S.C. §84, and concluded that Judge Walker's order did not constitute a "change of venue" under 28 U.S.C. §1404(c), as argued by the plaintiffs. App. D.

On April 30, 2003, Judge Walker issued an order denying plaintiffs' motion to hold the trial in San Francisco, concluding, as had Judge Hamilton, that trial in Eureka was "expressly authorized by statute, local rule and practice." App. E.

On May 6, 2003 – *six days* before the commencement of the jury trial – plaintiffs filed a petition for writ of mandamus, requesting that the Ninth Circuit order the case back to San Francisco and that the case be reassigned to another judge.

Plaintiffs' petition "suggested" that the matter be referred to "one or more of the judges comprising the panel which decided the prior appeal – Judges Bright, Pregerson and Fletcher . . ."

Three days later, and without allowing any input from defendants, the panel requested by the plaintiffs issued an order staying the proceedings, and establishing a briefing schedule for the mandamus petition.

On September 2, 2003, the panel issued a five-page, unpublished order granting all relief requested by the plaintiffs. App. A.

Defendants then filed a timely petition for rehearing and rehearing *en banc*. Despite the express request for rehearing *en banc*, the panel did not circulate the petition for consideration by the other judges in the Ninth

Circuit, and it was summarily denied on October 22, 2003. App. B.

The minutes of the clerk confirm that the panel chose not to circulate the petition for *en banc* consideration.[6]

Although the panel chose to recuse Judge Walker by way of an unpublished order, the panel's unprecedented decision did not go unnoticed. One noted Ninth Circuit historian commented that such a recusal ruling was unheard of.[7]

REASONS FOR GRANTING CERTIORARI

I.
THE PANEL'S RECUSAL ORDER DEPARTS SO FAR FROM THE ESTABLISHED JURISPRUDENCE OF THIS COURT AS TO WARRANT SUMMARY REVERSAL.

Incredibly, the panel's recusal order is based on a single ruling by the district court judge regarding the location of trial.

No error is assigned to that ruling, or to any other ruling by Judge Walker in the proceedings below. No reference is made to Judge Hamilton's independent determination that the trial location was expressly authorized by statute, or her determination that plaintiffs' recusal motion "failed to establish the appearance of bias, let alone actual bias." No reference is made to any statement (either in or out of court) or admonition by Judge Walker purporting to demonstrate bias against the plain-

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[6] "(per Eric, the panel will be handling this)," www.pacer.-ca9.uscourts.gov, 9/16/03.

[7] See, *The Recorder* (San Francisco), September 4, 2003, *9th Circuit Yanks Judge From Pepper Spray Case.*

tiffs or their attorneys. No reference is made to any financial interest by Judge Walker purporting to demonstrate bias. No reference is made to any out-of-court conduct or affiliation by Judge Walker purporting to demonstrate bias.

Instead, the panel bases its extraordinary recusal order on "an appearance of the lack of impartiality" because "the record shows that Eureka and Humboldt County are known for their strong ties to the logging industry and that there have been many incidents of hostility directed toward environmental activists in Eureka and its environs."[8] The panel notes that "no federal district judge" has held a trial in Eureka for more than thirty years. Not mentioned is the fact that a section 1983 civil trial was held in Eureka in 2001, before a *magistrate* of the Northern District.[9]

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[8]The "record" supporting this assertion was entirely anecdotal and conclusory. See, e.g., plaintiff's section 144 affidavit, concluding, *inter alia*, that "[s] o many people are associated with the timber industry and/or have many friends and relatives whose livelihood is related to that industry that the feeling of hostility pervades Humboldt and the surrounding counties." App. F. The order makes no mention of empirical data such as the current U.S. Census figures establishing that the timber industry now accounts for less than five percent of the Humboldt County economy. It is not noted that the second largest city in the County was the first in the nation to elect a Green Party city council or that a newly elected district attorney is prosecuting the very company that was the target of plaintiffs' "direct actions" in this case. More fundamentally, no statistical information is advanced to suggest that the San Francisco Bay area will produce a more neutral jury pool with respect to the actual issue to be tried – use of force to overcome resistance to arrest in the context of civil disobedience, whatever the cause of the activists.

[9]This was at the urging of District Court Judge Thelton Henderson. (*Thompson v. City of Eureka*, U.S.D.C. Case No. C96-3942-TEH).

This extraordinary and unprecedented recusal order strays so far from the course of established federal jurisprudence as to warrant summary reversal.

Ninety years ago, in *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913), a party to a bankruptcy proceeding sought to disqualify the presiding judge under 28 U.S.C. §144 (then §21 of the Judicial Code) based on the judge's rulings in the case. The Court explicitly disapproved that use of the statute, stating that "it was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise." *Id.*, at 44. Similarly, in *Berger v. United States*, 255 U.S. 22 (1921) the court proclaimed that: "The case establishes that the bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case." *Id.* at 31. The Court further explained the standards for recusal in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), when it held that, to be disqualifying, bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *Id.* at 582.

Consistent with this Court's pronouncements in *American Steel Barrel Co.*, *Berger*, and *Grinnell Corp.*, federal courts throughout the land have consistently concluded that judicial rulings, in and of themselves, are patently insufficient to warrant recusal. See, e.g., *United States v. Conforte*, 624 F.2d 869, 882 (9th Cir. 1980) (Kennedy, J.) ("[A] judge's views on legal issues may not serve as the basis for motions to disqualify."); *United States v. Conforte*, 457 F.Supp. 641, 652 (D. Nev. 1978) (In context of 28 U.S.C. §455 – "It is universally held that adverse judicial rulings on legal or factual

matters or the judge's views on particular legal issues do not support an inference of bias against a party sufficient to require recusal" – citing *United States v. Azhocar*, 581 F.2d 735, 738 (9th Cir. 1978).); *U.S. v. Haldeman*, 559 F.2d 31 (D. C. Cir. 1976) (*en banc, per curiam*), *cert. denied*, 431 U.S. 933 ("Cases reiterating the principle that the prejudice [justifying recusal] must be personal rather than judicial are legion."); *Hasbrouck v. Texaco, Inc.*, 830 F.2d 1513, 1524 (9th Cir. 1987) (finding motion for recusal under §455 to be "wholly without merit" because based solely on adverse rulings at trial); *Panzardi-Alvarez v. United States*, 879 F.2d 975, 984 (1st Cir. 1989), *cert. denied*, 498 U.S. 1082 (1990) ("prior adverse rulings alone cannot, of course, be the basis for a motion to recuse."); *United States v. Wilkerson*, 208 F.3d 794, 797 (9th Cir. 2000) ("A judge's views on legal issues may not serve as the basis for motions to disqualify," – citing, *Conforte*, 624 F.2d at 882); *United States v. Bauer*, 84 F.3d 1549, 1560 (9th Cir. 1996) (citing *Conforte*, 624 F.2d at 882); *Ouachita Nat. Bank v. Tosco Corp.*, 686 F.2d 1291, 1300 (8th Cir. 1982) adopted in pertinent part on reh'g, 716 F.2d 485, 488 (8th Cir. 1983) (*en banc*) ("[I] t should be self-evident that adverse rulings in themselves do not create judicial partiality."); *Johnson v. Trueblood*, 629 287, 291 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981); *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1020-1021 (5th Cir. 1981), *cert. denied*, 456 U.S. 960 (1982); *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *Green v. Branson*, 108 F.3d 1296, 1304 (10th Cir. 1997) ("[A] dverse rulings cannot in themselves form appropriate grounds for disqualification."); *Grove Fresh Distributors, Inc. v. John Labatt, Ltd.*, 299 F.3d 635, 639 (7th Cir. 2002) ("Judicial rulings are grounds for appeal not recusal.");

United States v. Arena, 180 F.3d 380, 398 (2nd Cir. 1999); *United States v. Diaz*, 176 F.3d 52, 112 (2nd Cir. 1999).

The panel's order becomes even more remarkable in view of the fact that the challenged ruling was assigned no error and, in fact, was determined to be expressly within the discretion of the District Court by an independently assigned judge. App. D.

This Court most recently addressed the requirements for recusal in *Liteky v. United States*, 510 U.S. 540 (1994). The plaintiff in that case, a Catholic priest, moved to disqualify the district judge under 28 U.S.C. 455(a) prior to the commencement of a second trial, based on the judge's repeated admonishment of the plaintiff in an earlier trial for attempting to use the proceeding as a "political forum," as well as the judge's evidentiary rulings in that trial. This Court unanimously agreed that neither the admonitions nor trial rulings provided sufficient grounds for disqualification.

Justice Scalia, writing for the majority, stated that only "in the rarest circumstances" can judicial rulings or opinions provide a basis for recusal, and only if these "display deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id.*, at 556. As an example, the Court referenced a statement attributed to the district judge in *Berger v. United States*, a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id.* at 555.

No rational interpretation of Judge Walker's decision to hold a trial in Eureka – a location expressly authorized by Congressional enactment – would support a

claim that it displayed "deep-seated and unequivocal antagonism that would render fair judgment impossible." If this were a valid interpretation of the ruling, then a similar conclusion must be reached with respect to the determination of Judge Hamilton that both the recusal motion and the motion regarding the location of trial were without merit. Under any notion of logic or reason, it is impossible to conclude that a legally correct ruling displays "deep-seated and unequivocal antagonism."

Even further from the recusal threshold – if that is possible – is the District Court's Rule 50 judgment for defendants in the first trial. Although that judgment was reversed by the Ninth Circuit, the only error assigned was the existence of disputes in "historical facts," and one panel member acknowledged this to be "a close call."[10]

Not surprisingly, of the handful of writs issued to recuse District Court judge's in the published history of the federal judiciary, no writ has ever been issued to remove an assigned judge because of a judicial ruling. See *infra*, pg. 14.

As Justice Rehnquist observed in *Laird v. Tatum*, 409 U.S. 824 (1972), regarding a pending motion to disqualify: "Those federal courts of appeal which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *Id.*, at 835.

The panel's order disregards this principle, and blatantly rewards judge-shopping, a practice which has

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[10]See, *supra*, fn. 2.

been universally condemned because it undermines the integrity of the judicial system. *Haldeman*, 559 F.2d at p. 134; *In Re Mason*, 916 F.2d 384, 385 (7th Cir. 1990) (the manipulation of judicial assignments through judge-shopping "would imperil the perceived ability of the judicial system to decide cases without regard to persons."); see also, Norwood, *Shopping For Venue: The Need For More Limits On Choice*, 50 U. Miami L. Rev. 267, 300 (1996) (stating that because "judge-shopping would invite public skepticism of the ability to receive justice in our court system and would cheapen the judicial process . . . judge-shopping is still 'universally condemned' by the courts").

Just as importantly, the panel's recusal order summarily usurps authority expressly granted to the District Court by Congress, and needlessly interferes with the ability of the District Court to conduct its business.

II.

THE PANEL'S DISREGARD FOR MANDAMUS REVIEW STANDARDS WARRANTS SUMMARY REVERSAL.

For more than one hundred years, this Court has repeatedly instructed that mandamus is a "drastic" and "extraordinary" remedy, requiring the moving party to satisfy the burden of showing a "clear and undisputable" right to the issuance of the writ. *Mallard v. United States Dist. Ct. for Southern Dist. of Iowa*, 490 U.S. 296, 309 (1989); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988); *Allied Chem. Corp. v. Diaflon, Inc.*, 449 U.S. 33, 35 (1980), quoting *Banker's Life and Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953), quoting *United States v. Duell*, 172 U.S. 576, 582 (1899).

There can be no question that the panel wholly ignored the requirements for mandamus petitions. The order assigns no legal error whatsoever to any decision by Judge Walker in the course of the proceedings, much less a clear and indisputable error. Nor could any such claim be made, as the Northern District is expressly authorized by Congress to conduct proceedings in Eureka under 28 U.S.C. §84(a) and, as noted by Judge Hamilton in the order denying recusal, under 28 U.S.C. §1404(c): "A district court may order any civil action to be tried at any place within the division in which it is pending."

The issuance of a writ to recuse a District Court judge is an exceedingly rare event in the published history of appellate decision-making. See, Wright & Miller, *Federal Practice and Procedure, Federal Rules of Civil Procedure*, §3553. In the handful of instances where such writs have been issued *none* have been based on a judicial ruling. See, *In Re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001) (Judge's statements to media that case pending before him involved "no issue" that the plaintiffs were injured justified mandamus to compel recusal); *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995) (proximity of judge's courtroom and chambers to destruction of federal building and granting of media interviews concerning the case warranted mandamus to compel recusal); *In Re School Asbestos Litigation v. Kelly*, 977 F.2d 764 (3rd Cir. 1992) (appearance of bias based on judge's paid-for attendance of plaintiff-sponsored asbestos conference); *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978) (Evidence of personal animus by a judge against defense counsel in previous cases, including a consideration of summary disbarment warranted mandamus to compel a recusal); *Pepsico, Inc. v. McMillen*, 764 F.2d

458 (7th Cir. 1985) (Mandamus compelling recusal warranted where person working on judge's behalf contacted law firms representing opposing parties in pending action concerning possible employment of judge after his retirement from bench); *SCA Services, Inc. v. Morgan,* 557 F.2d 110 (7th Cir. 1977) (Fact that judge's brother was a member of the law firm in a securities case warranted mandamus recusal); *United States v. Ritter,* 540 F.2d 459 (10th Cir. 1976) ("Totality of circumstances" including prior dealings between defense counsel and judge regarding resolution to impeach judge); *In Re Rodgers,* 537 F.2d 1196 (4th Cir. 1976) (Judge's former law partner a potential witness in pending case); *United Family Life Ins. Co. v. Barrow,* 452 F.2d 997 (10th Cir. 1971) (Judge's simultaneous handling of two conflicting bankruptcy cases in multi-district litigation warranted order for recusal on one of the cases); *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1965) (Judge's former representation of plaintiff's attorney warranted mandamus to recuse); *Rapp v. Van Dusen,* 350 F.2d 806 (3rd Cir. 1965) (Judge's use of counsel for the successful parties to prepare his answer to appellate court's transfer order, and consultation with these attorneys in absence of their adversaries warranted mandamus to compel recusal): *Occidental Petroleum Corp. v. Chandler,* 303 F.2d 55 (10th Cir. 1962) (Judge's repeated *ex parte* communications and discussions warranted recusal order); *In Re Honolulu Consol. Oil Co.,* 243 F. 348 (9th Cir. 1917) (financial conflict of interest); and *Connelly v. United States District Court,* 191 F.2d 692 (9th Cir. 1951) (recusal based on judge's out-of-court statements to defense counsel that his clients were "Commies").

The only clear and indisputable error in this case is the panel's unprecedented order, which simply ignores the

law and the record below, usurps the discretionary authority expressly granted to the district court by Congress, and for the first time in the known history of federal jurisprudence, issues a recusal writ based solely on a judicial ruling.

III.

THE PANEL'S DEPARTURE FROM APPELLATE PROCEDURE IN ALLOWING PLAINTIFFS TO SELECT THE PANEL TO HEAR THEIR MANDAMUS PETITION WARRANTS SUPERVISORY INTERVENTION BY THIS COURT.

Plaintiffs' "emergency motion" to consider and decide the mandamus petition "suggested" that the matter be referred to "one or more of the judges comprising the panel which decided the prior appeal – Judges Bright, Pregerson and Fletcher. . ."

Three days later, the three judges requested by plaintiffs issued an order staying the proceedings and establishing a briefing schedule for the petition. The same panel then issued the order granting all relief requested by the plaintiffs.[11]

At the risk of stating the obvious – the applicable rules do not allow litigants to select appellate panel members. Under federal rules promulgated by the Ninth Circuit, a petition for writ of mandamus must be processed as a "motion." See Ninth Circuit FRAP 21, 21-1,

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[11] Even the plaintiffs' attorney expressed surprise that the panel granted the request to recuse Judge Walker. See, *The Reporter* (San Francisco), September 4, 2003, *9th Circuit Yanks Judge From Pepper Spray Case*, quoting plaintiffs' attorney Tony Serra: "I expected only half of it, to tell you the truth . . . I kind of reasonably expected that they would change [the place of trial] but they went all the way."

21-3, 21-4, and Circuit Advisory Committee Note 21-4, stating that "[a] petition for writ of mandamus, writ of prohibition or other extraordinary relief is processed by the clerk and motions attorneys in the same fashion as a motion." The Ninth Circuit rules further require that motions are to be heard by three-judge motion panels assigned on a rotating basis by the clerk for a term of one month. Rule 27-1, Advisory Committee Note, and Ninth Circuit General Order 6.2.[12]

It is respectfully submitted that allowing litigants to choose the members of an appellate panel openly rewards the universally condemned practice of "judge shopping," threatens the integrity of the judicial system, and warrants supervisory intervention by this Court.

IV.
THE PANEL'S REFUSAL TO CIRCULATE DEFENDANTS' PETITION FOR *EN BANC* REVIEW WARRANTS SUPERVISORY INTERVENTION BY THIS COURT.

In addition to accommodating plaintiffs' request to hear the mandamus petition, the panel declined to circulate defendants timely-filed *en banc* petition, and no vote was ever taken on whether to hear the matter *en banc*.

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[12]Ninth Circuit General Order 3.7 was recently added to allow a "new appeal" to "come back" to the original panel following a remand. However, no similar provision exists for "motions." Furthermore, the panel has no obligation under General Order 3.7 to accept a "come back" case if "the new appeal presents no issues that would benefit from the earlier panel research." Here, the determination of the issues presented by plaintiffs' mandamus petition, i.e., recusal and trial location, could not conceivably benefit from the panel's prior consideration of plaintiffs' appeal, which addressed the issues of excessive force claims and qualified immunity.

The panel chose to issue the writ in the form of an unpublished order. In the case of an unpublished "motions" order, such as orders issued on mandamus petitions, the issuing panel has discretion to either circulate an *en banc* petition to all active judges, or reject the petition on behalf of the Circuit. See Ninth Circuit General Order 6.11.

It is difficult to imagine an order more deserving of consideration by the other members of the Circuit. Prior to the issuance of the order, only two writs had ever been issued in the known history of the Ninth Circuit to recuse a District Court judge – and both of those clearly involved "extrajudicial" matters, not rulings. See, *In Re Honolulu Consol. Oil Co.*, 243 F. 348 (9th Cir. 1917) (financial conflict of interest), and *Connelly v. United States District Court*, 191 F.2d 692 (9th Cir. 1951) (recusal based on judge's out-of-court statements to defense counsel that his clients were "Commies").

Although the order was not officially published it is well publicized and the practical effect on the entire judiciary of the District Court is profound: the unquestioned authority and discretion of District Court judges to make independent judicial determinations without fear of unfair scrutiny has been summarily usurped by the panel.

Any reasonable observer is left with the inescapable conclusion that the panel's refusal to circulate the petition for rehearing is proof that any assignment of bias or prejudice in this matter must be placed squarely with the panel, rather than the district court judge.

CONCLUSION

The issuance of a writ of mandamus qualifies as an "extraordinary" and "drastic" remedy. Even more extraordinary is the recusal of a district court judge. It is beyond extraordinary, i.e., unprecedented in the known history of federal decision-making, that a district court judge has been recused because of a ruling.

The affront to the District Court cannot be remedied by defendants prevailing at trial. Nor should defendants be required to proceed to trial before any newly assigned judge facing the specter of an appellate panel ready to seize control of the case at the behest of plaintiffs. These wrongs can only be remedied by this Court's exercise of its supervisory powers.

For all of the above reasons, Petitioners submit that the panel's order warrants supervisory intervention by this Court, and specifically request that the Court (1) grant certiorari, (2) summarily reverse the order of the Ninth Circuit panel, and (3) reinstate the District Court orders denying recusal (App. D) and change of situs of trial (App. E).

Respectfully submitted,

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APPENDIX A

[Filed SEP 02 2003]

No. 03-71883

D.C. No. CV-97-03989 - VRW
Northern District of California,
San Francisco

HEADWATERS FOREST DEFENSE,
Petitioner,

v.

UNITED STATES COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

THE COUNTY OF HUMBOLDT,
CITY OF EUREKA; DENNIS LEWIS,
Sheriff, GARY PHILP, Chief Deputy,
Real Parties In Interest.

Before: Bright,[1] PREGERSON, and W. FLETCHER, Circuit Judges.

Plaintiffs-petitioners are environmental activists who were injured by pepper spray applied to their eyes by law enforcement officials during a series of anti-logging pro-

[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

tests in Humboldt County. The facts are recounted in detail in our first decision in this case, *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1191-96 (9th Cir. 2000). Plaintiffs-petitioners request that this court order the return of the re-trial of this case to San Francisco, and that we direct the Clerk of the Northern District of California to reassign this case to another district judge. Plaintiffs brought suit against defendants under 42 U.S.C. § 1983. On defendants' motion for summary judgment, the district court granted all individual defendants qualified immunity except for officers Lewis and Philp. A nine day jury trial commenced in San Francisco on August 10, 1998. At the conclusion of the plaintiffs' case-in-chief, the defendants moved for judgment as a matter of law. In ruling on that motion, the district court held, contrary to its earlier decision, that Lewis and Philp were entitled to qualified immunity. The district court then dismissed the case against them, but denied judgment as a matter of law as to the remaining defendants – the County of Humboldt, the City of Eureka, and their respective sheriff's and police departments. The jury deadlocked four-to-four on the claims against the remaining defendants.

In a colloquy with counsel before declaring a mistrial because of a deadlocked jury, the district court on the record stated that the issue in this case is "a simple and straightforward one . . . . It's obviously one on which reasonable people can differ." The district court then declared a mistrial, set a new trial date in San Francisco, and took under submission defendants' renewed motion for judgment as a matter of law.

Eight weeks later, the district court issued an order reversing its earlier ruling, granted defendants' renewed motion for judgment as a matter of law, vacated the new

trial date, and entered judgment for the remaining defendants – the County of Humboldt, the City of Eureka, and their respective sheriff's and police departments. In doing so, the district court stated "there is no reasonable basis for jurors to find that the officers' use of [pepper spray] was objectively unreasonable in light of the facts and circumstances confronting them."

The case then came before us. We reversed. We held that (1) the district court erred in granting judgment as a matter of law on qualified immunity grounds to Lewis and Philp; and (2) the district court erred in granting the renewed motion for judgment as a matter of law to the County of Humboldt, the City of Eureka, and their respective sheriff's and police departments. 240 F.3d 1185 (9th Cir. 2000). The Supreme Court granted certiorari, vacated our judgment, and remanded for further consideration in light of its recent decision in *Saucier v. Katz*, 533 U.S. 194 (2001). *County of Humboldt v. Headwaters Forest Defense*, 534 U.S. 801 (2001). On remand from the Supreme Court, we applied the *Saucier* qualified immunity analysis, reaffirmed our earlier decision, and remanded for a new trial. *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002), *cert. denied, County of Humboldt v. Burton*, 123 S.Ct. 513 (2002).

On January 23, 2003, at a status conference not held on the record, the district court set May 12, 2003, as the date for the re-trial.[2] At the same time, the district court *sua sponte* transferred the trial to Eureka, California, the county seat of Humboldt County. One of the defendants is the City of Eureka itself, and another defendant is Humboldt County. Eureka and Humboldt County are

[2] We have stayed the re-trial of this case pending our disposition of the matter.

home to the remaining defendants. The record shows that Eureka and Humboldt County are known for their strong ties to the logging industry and that there have been many incidents of hostility directed toward environmental activists in Eureka and its environs. Although there is a federal court facility in Eureka, no federal district judge has held a trial there in the last thirty years.[3]

On this record it appears that the district court's actions reveal an appearance of an absence of impartiality sufficient to warrant reassigning this case. We therefore GRANT petitioner's requested relief and direct the Clerk of the Northern District of California to reassign this case to another district judge through the Northern District's random selection process; we also VACATE the order transferring the re-trial to Eureka.

SO ORDERED.

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[3] Almost thirty years have passed since the last time a federal district judge presided over a trial in Eureka. Judge Samuel Conti presided over a criminal trial in Eureka in 1973.

APPENDIX B

[Filed OCT 22 2003]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-71883

HEADWATERS FOREST DEFENSE,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,

Respondent.

THE COUNTY OF HUMBOLDT, CITY OF
EUREKA; DENNIS LEWIS, Sheriff;
GARY PHILP, Chief Deputy,

Real Parties in Interest.

ORDER

Before: BRIGHT,[1] PREGERSON, and W. FLETCHER, Circuit Judges.

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[1] The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

The Petition for Rehearing and for Rehearing En Banc is denied.

APPENDIX C

[Filed APR 17 2003]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-97-3989-VRW

HEADWATERS FOREST DEFENSE, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al,

Defendants.

ORDER

Plaintiffs have filed a motion under 28 USC §§144 and 455 to recuse the undersigned from presiding further over this action. Without making the determination set forth under Civil LR 3-15, the court refers the motion for disqualification to the clerk for random assignment to another judge. See *United States v Grinnell Corp,* 334 US 563, 582 n13 (1965); *United States v Azhocar,* 581 F2d 735, 738 (9th Cir 1978); *Tenants and Owners in Opposition to Redevelopment v Department of HUD,* 338 F Supp 29, 31 (ND Cal 1972). Cf *Quick v State Farm Ins Co,* No. C-01-2138-CW, order (ND Cal, Nov 8,

2001) (although 28 USC §144 does not require reassignment, referral to another judge may be appropriate).

To the extent plaintiffs' motion raises issues under 28 USC §455, the judge to whom this matter is referred may wish to consider the Ninth Circuit's decision in *In re Bernard*, 31 F3d 842 (9th Cir 1994), in determining whether those issues should be resolved by the referral judge or by the undersigned.

IT IS SO ORDERED.

/s/ Vaughn R. Walker
VAUGHN R WALKER
United States District Judge

APPENDIX D

[Filed APR 23 2003]

NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 97-3989 VRW

HEADWATERS FOREST DEFENSE, et al.,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al.,

Defendants.

ORDER

Before the court is plaintiffs' motion for an order pursuant to 28 U.S.C. §144 and §455 disqualifying the Hon. Vaughn R. Walker from presiding over the above-entitled action, which has been assigned to him from its inception. Plaintiffs claim that Judge Walker is biased and prejudiced against them and their claims.

Plaintiffs assert that this bias and prejudice is demonstrated by certain findings set forth in Judge Walker's

October 26, 1998, order dismissing the case after the jury in the first trial was unable to reach a decision; and by his order on January 23, 2003, transferring venue for the second, upcoming, trial to the City of Eureka, California, the place where the underlying events occurred.

Based on the Ninth Circuit's reversal of Judge Walker's rulings, plaintiffs contend that "any reasonable person" would believe that Judge Walker was biased and prejudiced against plaintiffs. Plaintiffs also assert that Judge Walker's sua sponte transfer of the upcoming trial to Eureka – "a community which Judge Walker knows to harbor intense feelings of hostility toward plaintiffs" – could have been motivated only by bias and prejudice toward plaintiffs.

Plaintiffs make their request under both recusal statutes, §144, which requires a showing of actual bias, and §455, which requires a mere appearance of bias. Section 144 provides for recusal where a party files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice against that party. 28 U.S.C. §144. If the judge finds the motion timely and the affidavit legally sufficient, he must proceed no further and a another judge must be assigned to heaer the recusal motion. *Id.* If the judge finds the affidavit legally insufficient, recusal is denied. *Id.* A separate statute, §455, requires a federal judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including instances where the judge has a personal bias or prejudice against a party. 28 U.S.C. §455.

Under either statute, recusal is appropriate only if "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Yagman v. Republic Ins.*,

987 F.2d 622, 626 (9th Cir. 1993) (quotation omitted). Because a federal judge is presumed to be impartial, the party claiming bias bears a substantial burden to show that the judge is not impartial. *Reiffin v. Microsoft Corp.*, 158 F.Supp.2d 1016, 1021-22 (N.D. Cal. 2001).

The case was before the Ninth Circuit on plaintiffs' appeal of the ruling that two of the individual defendants were entitled to qualified immunity as a matter of law, and on their appeal of the order granting defendants' motion for judgment as a matter of law. The Ninth Circuit reversed, based on a number of the factual findings in Judge Walker's order, which the court noted was "replete with assertions that the weight of the evidence favors the defendants and with conclusions that the court reached by resolving conflicts in the evidence *against* the nonmoving parties." *Headwaters Forest Defense v. County of Humboldt*, 240 F.3d 1185, 1191 (9th Cir. 2000), *cert. granted, jmt vacated*, 534 U.S. 801 (2001), *on remand*, 276 F.3d 1125, *cert. denied*, 123 S.Ct. 513 (2002). Plaintiffs claim, based solely on the fact that Judge Walker was reversed by the Ninth Circuit, that his decision in finding for the defendants can be explained only as the product of bias or prejudice against the plaintiffs.

"Bias or prejudice" connotes "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . or because it is excessive in degree." *Liteky v. United States*, 510 U.S. 540, 550 (1994). Adverse rulings, even if erroneous, generally do not provide a basis for disqualifying a judge under either §144 or §455. *See United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) ("alleged bias or prejudice to be dis-

qualifying must stem from an extrajudicial source"); *see also Leslie v. Grupo ICA*, 198 F.3d 1152, 1160 (9th Cir. 1999) (court's adverse rulings are not adequate basis for recusal); *Toth v. TWA, Inc.*, 862 F.2d 1381, 1388 (9th Cir. 1988) (same).[1]

The court finds that plaintiffs have not established the appearance of bias, let alone actual bias. Judicial rulings occurring in the course of a judicial proceeding will "almost never" provide a basis for a recusal motion. *Liteky*, 510 U.S. at 555. Such a motion will be proper only if the rulings "display a deep-seated favoritism or antagonism that would make fair judgment impossible." Plaintiffs provide no evidence of any deep-seated favoritism or antagonism that stems from an extrajudicial source, and have not established that there is a reasonable question as to whether Judge Walker has a wrongful or inappropriate predisposition toward plaintiffs. Accordingly, the motion to disqualify based on the adverse post-trial rulings must be denied.

With regard to the change in the location of the trial, plaintiffs have not established that Judge Walker was motivated by bias or prejudice. A district court may order any civil action to be tried at any place within the division in which it is pending.[2] 28 U.S.C. §1404(c).

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[1] Nor do plaintiffs cite any authority suggesting that assignment to the same trial judge following a reversal provides a basis for a finding of bias or prejudice.

[2] As peripheral matter, the court agrees with defendants that the decision to hold the trial in Eureka does not constitute a change in "venue," as the venue remains in the San Francisco Division of the Northern District of California. *See* 28 U.S.C. §84 (California is divided into four judicial districts – the Northern, Eastern, Central, and Southern Districts of California – and "[c]ourt for the Northern District shall be held at Eureka, Oak-

[footnote continued]

Moreover, if plaintiffs are unhappy about the decision to move the trial to Eureka, the appropriate procedure would be for plaintiffs to seek relief from the Ninth Circuit. *See El Ranco, Inc. v. First Nat'l. Bank of Nevada,* 406 F.2d 1205, 1219 (9th Cir. 1968) (holding that burden is on complaining parties to establish that district judge abused his discretion in setting the place of trial).

As an additional basis for denying the motion, the court finds plaintiffs' request to be untimely. A motion to disqualify for bias or prejudice under either §144 or §455 must be "timely." Section 144 specifically requires that the motion be based on a "timely and sufficient" affidavit. Although §455 contains no express time limit, there is a timeliness requirement inherent in the statute. *In re Anwiler,* 958 F.2d 925, 930 (9th Cir. 1992). A party must file a §455 recusal motion "with reasonable promptness after the ground for such motion is ascertained." *Preston v. United States,* 923 F.2d 731, 733 (9th Cir. 1991).

Plaintiffs have been aware of Judge Walker's factual findings since they were issued on October 26, 1998. The case was remanded on March 8, 2002, and the parties were advised at the January 24, 2003, case management conference that the trial would be conducted in Eureka.[3] Yet plaintiffs waited until April 14, 2003, ten days

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land, San Francisco and San Jose"); Civ. L.R. 3-2 (motion for change of venue may be made when civil action has not been assigned to proper division within this district).

[3] According to the declaration filed by defendants' counsel, however, Judge Walker announced his intention to hold the first trial in Eureka in 1998, and the trial was held in San Francisco only because of the lack of available courtroom space in Eureka.

before the date set for the pretrial conference and less than a month before trial, to bring this motion. While timeliness is not the only factor the court has considered in ruling on this motion, plaintiffs' failure to bring this motion with reasonable promptness further weakens their position.

In accordance with the foregoing, the court finds that the motion to disqualify Judge Walker from presiding over this action must be DENIED.

IT IS SO ORDERED.

Dated: April 23, 2003

/s/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

[Certificate of Service Omitted in Printing]

APPENDIX E

[Filed APR 30 2003]

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF CALIFORNIA

No. C-97-3989-VRW

HEADWATERS FOREST DEFENSE, et al,

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al,

Defendants.

ORDER.

Plaintiffs have filed a motion regarding the situs of trial. By this motion, plaintiffs seek to move the trial to San Francisco from Eureka, the location designated by the court at the January 23, 2003, further case management conference. See Doc #276. Defendants oppose plaintiffs' motion. See Doc #294.

I

At the January 23, 2003, case management conference held after remand of the case by the Ninth Circuit,

the court informed the parties that trial would be conducted in Eureka.

Contrary to plaintiffs' characterization, this did not constitute a "change of venue." Venue refers to the judicial district or division in which an action proceeds. See 29 USC §§1391, 1404 (discussing venue as the "judicial district" or "division" in which a suit may be brought or transferred). The Northern District of California includes Humboldt County. 28 USC §84(a). Plaintiffs properly commenced this action in the Northern District of California as the judicial district in which defendants reside and in which the events at issue substantially occurred. See Compl (Doc #1); 28 USC §1391.

Unlike some other districts, the Northern District of California is not statutorily divided into separate divisions. Compare id §84(a) *with* id §84(c) (Central District of California comprises three divisions: eastern, western and southern). The Northern District of California is authorized to conduct proceedings at "Eureka, Oakland, San Francisco, and San Jose." Id §84(a). The Northern District 's civil local rules provide that the court shall be in "continuous session in the following locations: San Francisco Division, Oakland Division and San Jose Division." Civil LR 3-1. By implication, therefore, the court is in non-continuous session at Eureka. More importantly, the "Divisions" referred to in the local rules are not "divisions" in the statutory sense, but simply shorthand references adopted for administrative convenience. Indeed, the civil local rules also provide that: "From time to time sessions may be held at other locations within the district as the Court may order." Id. Thus, the court may conduct business at places other than those provided by statute.

"A district court may order any civil action to be tried at any place within the division in which it is pending." 28 USC §1404(c). As the Northern District is not a statutorily "divided" district, cases may be tried at any place in the district. The decision to set the trial location is vested in the discretion of the district court; the court need not present "good cause" for setting the location of trial pursuant to 28 USC §1404(c). *El Ranco, Inc v. First Nat'l Bank of Nevada,* 406 F2d 1205, 1219 (9th Cir 1968), *cert denied,* 396 US 875 (1969). The Ninth Circuit has explained that the district court's decisions to move the place of trial after a previous trial in the case resulted in a hung jury is "entirely in the discretion of the trial court." *Lung v United States,* 111 F2d 640, 641 (1940). No "affirmative showing" to justify the transfer is necessary as long as it comports with federal statutes. Id at 640-41.

Eureka, of course, is located within the Northern District, 28 USC §84(a), and cases arising there are assigned to judges maintaining chambers in San Francisco and Oakland. See Civil LR 3-2(d). Even assuming without deciding that the divisions created by civil local rule may alter the operation of the venue statute, the decision to conduct the second trial in Eureka is authorized by 28 USC §1404(c). No reassignment or venue transfer occurs by virtue of holding trial in Eureka as opposed to San Francisco or elsewhere in the district. Hence, plaintiffs suffer no injury to their choice of venue in the Northern District. Because there has been no change of venue, plaintiffs' motion to "change venue" is DENIED.

II

Plaintiffs, however, argue that they cannot obtain a fair trial in Eureka. In support of that contention, plain-

tiffs supply eight declarations, three of which are identical except for the declarant's identity, and numerous newspaper clippings, only one of which directly relates to this case. See Doc #278. On the date of the hearing on this matter, plaintiffs also submitted supplemental materials, including a newspaper advertisement, a press release and a videotape of a television commercial paid for by Pacific Lumber, none of which also directly relates to this case. The gist of plaintiffs' contention is that Eureka is a battleground of the "Timber Wars," a community heatedly divided between those favoring timber harvesting and those favoring environmental protection. In this contentious atmosphere, plaintiffs say they cannot receive a fair trial.

The court finds surprising the suggestion that this controversy has not reached San Francisco or that a jury drawn from Bay area counties would be any less riven by the competing values the two sides of this controversy represent. See, e g, "Kopp Wants Harsher Bridge Protest Penalty", *S F Chron,* Dec 3, 1996, at A18 (discussing reaction to environmental protestors who disrupted traffic on the Golden Gate Bridge to denounce government action concerning the Headwaters forest in Humboldt County); B W Rose, "S R Gap Site of Logging Protest", *Santa Rosa Press Democrat,* Nov 28, 1998, at B1 (discussing protests in San Francisco, Berkeley and Santa Rosa to protest logging plans on the North Coast); Malcolm Glover, "Protest against Pac Bell results in five arrests", *S F Examiner,* May 3, 1996, at A10 (discussing protest of local utility's use of paper harvested from Canadian forests). But the main point remains, this case is not about the so-called "Timber Wars". The case is about police practices. In that regard, it matters not what cause plaintiffs had undertaken to support. The

case concerns the reasonableness of the defendants' conduct, not the worthiness or contemptability of plaintiffs' cause. Assessing the reasonableness of defendants' conduct is made best by a jury drawn from the community most directly affected.

A

Plaintiffs contend that they have established the sort of pervasive community bias warranting a transfer of trial location. Plaintiffs rely on a series of cases, including *Irvin v Dowd*, 366 US 717 (1961), *Groppi v. Wisconsin*, 400 US 505 (1971), and *Pamplin v Mason*, 364 F2d 1 (5th Cir 1966), for the proposition that voir dire would be futile because "jurors' statements of impartiality, as expressed in voir dire in a community where feelings run high, can be given little weight." Pls Mem (Doc #277), at 6 (internal quotation omitted).

It is true that if a "pattern of deep and bitter prejudice is shown to be present throughout the community," then trial in that particular community may not be appropriate. *Irvin*, 366 US at 727 (internal quotation omitted). In *Irvin*, the Court was confronted with the Fourteenth Amendment implications of a jury of which two-thirds had expressed "an opinion that [the defendant] was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief." Id. Nearly 90% of the 430 potential jurors in that case expressed some belief in the defendant's guilt. Id. "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." Id.

Even if the court were to apply the heightened due process protections owed to the criminally accused, such as the capital defendant in *Irvin*, to plaintiffs' civil rights claims, plaintiffs have not demonstrated that voir dire will be futile or a sham. Certainly, the court will take all proper measures to ensure the empanelment of a fair and impartial jury in accordance with the parties' due process rights. And there are several material differences between the circumstances of the cases relied upon by plaintiffs and the case at bar which indicate that an impartial jury may be empaneled in Eureka.

While there evidently continues to be highly publicized disputes between environmental and logging advocates in Eureka and elsewhere in the Northern District, the incidents directly at issue in this case occurred six years ago. This is not a case in which a "wave of public passion" has been created as a result of pretrial publicity concerning the evidence in the case. Plaintiffs make only opaque and vague references to a climate of physical confrontation and in their declarations refer specifically to only one incident resulting in a police report.

Plaintiffs' declarations and newspaper clippings convey the impression of a community divided on the issues timber harvesting between environmental activists and logging interests, a debate ongoing for several years. News accounts and public dialogue concerning the Humboldt County district attorney's suit against Pacific Lumber regarding that company's timber harvesting plans and other disputes between environmentalists and loggers are not directly related to the reasonableness of the use of pepper spray in this case and seem unlikely to result in a jury pool thoroughly tainted with preconceived notions of the evidence or ultimate issues in this case.

"[I]t is not required * * * that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." *Irvin*, 366 US at 722-23. "To hold that the mere existence of any preconceived notion [of the ultimate issues], without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id.

To the extent plaintiffs attack the impartiality of jurors that have not been selected, these arguments seem premature and are properly raised instead during the jury selection process. The Ninth Circuit has long held that "[t]he effect of pretrial publicity can be better determined after the voir dire examination of the jurors." *Narten v Eyman*, 460 F2d 184, 187 (9th Cir 1969) (internal quotation omitted). In the instances that a change of trial site or venue was found to be appropriate *before* jury selection, courts found convincing empirically sound evidence of the level of community bias. See *Washington Public Utilities Grp v United States Distrct Court*, 843 F2d 319, 322 (9th Cir 1988) (district court presented with "statistical evidence" including "an affidavit * * * analyzing * * * public perceptions * * *, a statistical survey designed to measure public opinion and attitudes towards parties and issues in the case, along with an analysis of the survey results"). Plaintiffs have offered no such evidence in connection

with the instant motion, which would allow the court to gauge whether the nature of community sentiment precludes selection of an impartial jury from Eureka and the surrounding areas.

In addition, plaintiffs do not claim that the prejudice within the community is targeted uniformly against them. See *Swindler v Lockhart*, 495 US 911, 912-13 (1990) (Marshall, J, dissenting) (expressing due process concern in criminal trial in which 98 out of 120 venirepersons expressed a belief that defendant was guilty: one venireperson noted that he had never heard "anybody state that they thought [defendant] was not guilty").

Plaintiffs' declarations and media clippings all note the divided nature of the community. In other words, many in the Eureka community support environmental activists on issues of land use. The presence of meaningful disagreement within the community means that there is no "huge wave of public passion" against plaintiffs. Of course, citizens partial to one side or the other and unable to discharge properly their duties as jurors have no place in the jury box. But plaintiffs have not credibly established that the court will be unable to seat a jury capable of rendering an impartial verdict.

B

Plaintiffs also contend that trial in Eureka would pose a threat of physical violence against them and their attorneys. See, e g, Serra Decl (Doc #276, Exh A). The parties may rest assured that the court is working with the United States Marshal to secure the trial location for the protection of the litigants. Although one of plaintiffs' attorneys asserts that he believes he will be sub-

ject to direct threat and assault during trial, no such threats have been identified. Insofar as plaintiffs or their attorneys perceive specific threats to their physical safety at court, they are directed to advise the court and the United States Marshal immediately.

C

Plaintiffs also argue that they would suffer prejudice from a Eureka trial because local jurors would favor defendants and their attorneys as "the home team." Pls Mem (Doc #277), at 5. According to plaintiffs, "no matter how thorough the voir dire may be, human nature will lead jurors to favor 'their own.' " Id. But as defendants point out, several plaintiffs are residents of the community, and plaintiffs have not explained why a jury assembled in Eureka would blindly regard defendants and counsel as the "home team" and render judgment in their favor on that basis. Indeed, the court notes that one of the remaining individual defendants, former Humboldt County sheriff Dennis Lewis, lost his reelection campaign after the events in question in this case and that Humboldt County voters elected a district attorney who promptly sued Pacific Lumber for allegedly fraudulent logging practices. There is no reason for the court to believe that a properly selected jury would be biased in favor of defendants as "the home team."

A related argument made by plaintiffs is that because any damage award would be paid out of the city's and county's coffers, a jury composed of Humboldt County and Eureka taxpayers would have a financial interest in the outcome of the case, thereby biasing their decision. But the Ninth Circuit has explained that "an

immeasurable and seemingly insignificant economic benefit to a taxpayer [does not] suffice[] to disqualify" potential jurors from service. *Los Angeles Memorial Coliseum Comm'n v National Football League,* 726 F2d 1381, 1400 (9th Cir 1984), *cert denied,* 469 US 990 (1984) (no prejudice in jury in which four of eight jurors were not Los Angeles county residents and in which the judge was satisfied with responses to questions during voir dire concerning any financially motivated bias); cf *United States v Brown,* 540 F2d 364, 379 (8th Cir 1976) (no basis to strike jurors for cause based solely on their residency in the county allegedly defrauded by defendants).

In this case, pursuant to established court procedure, jury summonses have been sent out not only to Humboldt County residents but also to those in Del Norte, Mendocino and Lake counties, and the court will undertake to examine potential jurors on whether any financial motivation would render them unfit for service.

Moreover, trial of the case in Eureka would afford an opportunity for residents in a portion of the Northern District not normally able to serve on a federal jury as a practical consequence of distance to do so.

Although the Northern District of California is not statutorily divided into divisions, pursuant to 28 USC §1869(e) the court's Gen Ord No 6 divides the district into "divisions for jury selection purposes." Id. The "San Francisco-Oakland jury division" consists of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo and Sonoma counties; the "Eureka jury division" consists of Del Norte, Humboldt, Lake and Mendocino counties. Pursuant to the court's random jury selection plan, see 28 USC §1863, jurors for trials held in San Francisco or Oakland are selected from both the

San Francisco-Oakland and Eureka "jury divisions." See Order of Chief Judge Marilyn Hall Patel, Feb 3, 2003, Notice of Refilling the Qualified Jury Wheel. But a potential juror "residing more than 80 miles from the place of holding court" obtains, upon request, an excuse from jury service in light of the "undue hardship or extreme inconvenience" such service would entail. See Gen Ord No 6, § X.

As a result, residents of the "Eureka jury division" seldom have an opportunity to serve on juries in this district. Court records show that on the last occasion on which juror qualification questionnaires were sent to residents of Del Norte, Humboldt, Lake and Mendocino counties for possible service at either San Francisco or Oakland, only 63 potential jurors out of 2,100 did not request to be excused and were otherwise qualified for service. This circumstance is plainly problematic in light of Congress's directive that all residents of a district should have the opportunity to serve as jurors. See 28 USC § 1861 ("It is * * * the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States * * *.").

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v Connor,* 490 US 386, 396 (1989) (internal quotation omitted). The community living under the use of force at issue certainly possesses a strong interest in considering the reasonableness of the practice, and it is appropriate to submit the question to a jury drawn from that community for determination.

Because "there is no clearly defined standard of reasonableness for the court to apply [,] * * * such a standard should emerge from the conscience of the community * * *." *Bennett v Murphy,* 127 F Supp 2d 689, 690 (WD Pa 2000), *vacated on other grounds,* 274 F3d 133 (3d Cir 2002). "The question of reasonableness [in an excessive force case] is quintessentially a matter of applying the common sense and community sense of the jury to a particular set of facts and, thus, it represents a community judgment." *Wells v Smith,* 778 F Supp 7, 8 (D Md 1991). Cf *United States v Gleason,* 616 F2d 2, 15 (2d Cir 1979) ("Confidence in our jury system leads us to leave credibility solely to the jury which, as the conscience of the community, is expected to act with sound judgment.").

Notably, the case in this district most recently tried before a jury in Eureka, *Thompson v McCauley et al,* Case No C-96-3942, also concerned section 1983 claims action against the County of Humboldt, the City of Eureka and numerous officers for alleged civil rights violations, including excessive force.

Setting the trial of the present case in Eureka is not only permissible, but it comports with the fact-intensive inquiry required to determine whether officers acted with reasonable or excessive force against plaintiffs and with the recent practice of this court of locating trial where such an inquiry can best be made.

As the court explained at the March 27, 2003, hearing, this is a "case that arises in Humboldt County and seems * * * in as much as Humboldt County is an appropriate place, an official place of court, that that's the place to try this case." Rptr Trns (Doc #300), at 46.

D

Plaintiffs also contend that the court abused its discretion by failing to consider the "extreme[] inconvenience[]" that a Eureka trial site would impose on "some of the witnesses, to some of the plaintiffs, and to all of the attorneys for the plaintiffs." Pls Mem (Doc #277), at 8. But plaintiffs fail to identify a single witness or plaintiff who would be inconvenienced or how such convenience is "extreme." Plaintiffs also contend that the relative means of the parties weigh in favor of a San Francisco trial, but they present no evidence of their own means.

It remains without dispute that attending trial in Eureka would be convenient for many of the witnesses and parties on both sides. Although there is no legal basis to consider the convenience of attorneys in selecting a trial site, cf *Soloman v Continental American,* 472 F2d 1043, 1047 (3d Cir 1973) (holding convenience of counsel immaterial under §1404(a)), the court notes that one of plaintiffs' attorneys has submitted a declaration in connection with this very motion indicating that he was in trial in Eureka recently; that declaration did not suggest any inconvenience therefrom.

E

Finally, plaintiffs contend that "[i]t is virtually unprecedented" for a trial to be moved from a neutral ground to one that is "extremely hostile to one or more parties." Pls Mem (Doc #277), at 7. As discussed, plaintiffs have not established that a trial in Eureka would be prejudicial to their due process rights and insofar as juror impartiality is concerned, that is a matter for voir dire. Moreover, as previously noted, the statute

creating the Northern District provides that "[c]ourt for the Northern District shall be held at Eureka," among other places. 28 USC §84(a). The court regularly conducts extensive judicial business at its Eureka courthouse and has tried a case of similar type in Eureka in the very recent past. Hence, the decision to hold the trial in Eureka is hardly "unprecedented," but expressly authorized by statute, local rule and practice.

III

Finally, plaintiffs argue that the undersigned's decision to move the site of the second trial to Eureka constitutes "further proof" of the court's intention to prejudice plaintiffs. See Pls Mem (Doc #277) at 9 n5. Additionally, the court is in receipt of a letter by plaintiffs dated April 29, 2003, requesting that the court decide their "pending" recusal motion "as soon as possible." The clerk is directed to file this letter.

By written order dated April 17, 2003, the court referred plaintiffs' recusal motions to the clerk for reassignment to another district judge. See Doc #290. In that order, the court noted that "[t]o the extent plaintiffs' motion raises issues under 28 USC §455, the judge to whom this matter is referred may wish to consider the Ninth Circuit's decision in *In re Bernard* in determining whether those issues should be resolved by the referral judge or by the undersigned." Id (internal citation omitted).

The recusal motion was promptly assigned to Judge Hamilton, who denied plaintiffs' motion. See 4/23/03 Order (Doc #306). Judge Hamilton expressly considered and addressed plaintiffs' section 455 arguments, holding that "plaintiffs have not established the appearance of

bias, let alone actual bias" and that plaintiffs' motion thereunder was untimely. Id at 3-4. Hence, plaintiffs have already received a decision on their recusal motion under section 455. Id at 5 (denying plaintiffs' motion to disqualify the undersigned). Because Judge Hamilton's ruling addressed the court's decision to locate the second trial in Eureka, the court does not address plaintiffs' arguments touching on the court's motivation or bias in setting the location of the second trial.

Recusal under section 455, as explained by Judge Hamilton, "requires a mere appearance of bias." Id at 2. Section 455 "requires a federal judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned * * *." Id. Even if the section 455 motion should have been decided by the undersigned, it is clear based on Judge Hamilton's ruling that plaintiffs have failed to meet that objective burden. Id at 3 (holding that plaintiffs have not established either the appearance of bias or actual bias).

IV

In sum, the court DENIES as moot plaintiffs' motion for "change of venue" and DENIES their request to change the locaton of the second trial, which the court has designated to take place in Eureka (Doc #276).

IT IS SO ORDERED.

/s/ Vaughn R. Walker
VAUGHN R WALKER
United States District Judge

APPENDIX F

[Filed April 14, 2003]

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CASE C-97-3989 VRW

HEADWATERS FOREST DEFENSE, et al

Plaintiffs,

v.

COUNTY OF HUMBOLDT, et al

Defendants.

PLAINTIFFS' RECUSAL MOTION

POINTS AND AUTHORITIES

April 24, 2003

Plaintiffs respectfully submit the following Points and Authorities in support of their Motion to Recuse Judge Vaughn R. Walker from this case:

As set forth in the attached Affidavit of Bias and Prejudice signed by Plaintiff Lundberg, plaintiffs and their attorneys believe that Judge Walker is actually biased and prejudiced against the plaintiffs herein and their claims. Plaintiffs and their attorneys also believe that any reasonable person aware of the facts and circumstances would believe that Judge Walker is biased and prejudiced against the plaintiffs and their claims.

The bias and prejudice is clearly revealed by (a) particular findings that are set forth in Judge Walker's decision, filed October 26th, 1998, dismissing the case after a hung jury in the first trial of this lawsuit, and (b) Judge Walker's completely unjustifiable decision to conduct the retrial of this case in a community that is known by Judge Walker to be extremely hostile to the plaintiffs.[1]

Plaintiffs do not argue that the *fact* of Judge Walker's rulings disqualify him. They argue that particular statements, particular findings, and particular rulings of Judge Walker reveal a biased and prejudicial mindset and that Judge Walker's biased and prejudiced mindset may be clearly discerned by any reasonable person.

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[1] Please see plaintiffs' Motion Re Situs of the Trial that is filed concurrently with the instant Motion and is incorporated by reference hereto.

The test to be applied in evaluating recusal and disqualification of judges was clearly stated many years ago in *Berger v. United States* (1921) 255 U.S. 22: Does the Affidavit of Prejudice [executed by a party] give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment (225 US at 33-34).

In *Bell v. Chandler* (10th Circuit, 1978) 569 F.2d 559, the Court observed that 28 U.S.C. 144[2] requires that a judge who is the subject of a motion for recusal must cease to act in the case after determining the legal sufficiency of the motion. The Court pointed out that no direct relationship between the judge and the party or the case is required under Section 144 in order to have a showing of bias (569 F.2d at 569).

That Court also noted that, pursuant to 28 U.S.C. 455, subsection (a) questions whether "there exists a reasonable likelihood that the cause will be tried with the impartiality that litigants have a right to expect in

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[2] 28 U.S.C. 144 provides that: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. 455(a) provides that: Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

a United States district court." *United States v. Ritter,* 540 F.2d 459, 464 (10th Cir.), cert. denied, 429 U.S. 951, 97 S.Ct. 370, 50 L.Ed.2d 319 (1976). The Court further explained that, under the same section, the Court held in *Webber v. McGhie Land Title Co.,* 549 F.2d 1358, 1361 (10th Cir. 1977), that the "appearance of impartiality is virtually as important as the fact of impartiality."

In *United States v. Antar,* (3rd Circuit, 1995) 53 F.3d 568, the Court pointed out that the relevant consideration requires that, if a "reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality" under the applicable standard, then the judge must recuse. *In re Larson,* 43 F.3d 410, 415 (8th Cir. 1994) (quoting *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1111 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980)).

That Court also explained, "But in determining whether a judge had the duty to disqualify him or herself, our focus must be on the reaction of the reasonable observer. If there is an appearance of partiality, that ends the matter. *Haines v. Liggett Group Inc.,* 975 F.2d 81, 98 (3d Cir. 1992); *Lewis v. Curtis,* 671 F.2d 779, 789 (3d Cir.) ("Impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system."), *cert. denied,* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982)". The *Antar* Court also pointed out that the judge does not have to be *subjectively* biased or prejudiced, so long as he *appears* to be so.

THE INSTANT CASE

There can be no doubt that the conduct of Judge Walker demonstrates, both objectively and subjectively, that Judge Walker is biased and prejudiced against the

plaintiffs in this case, and that any reasonable person would believe that to be the case.

THE OCTOBER 26, 1998, ORDER DISMISSING THE CASE

In Judge Walker's Order, filed October 26, 1998, dismissing the case, he made a number of fact findings and mixed fact and law findings that were simply contrary to the evidence. In fact, the Ninth Circuit opinion that reversed Judge Walker referred to four particular findings of Judge Walker that the Court of Appeals found to be contrary to the evidence.

Specifically, the Court of Appeals ruled[3] that Judge Walker's conclusion that ". . . the severity of the intrusion upon the arrestees' personal integrity was minimal" was simply wrong. The Court of Appeals found that the pepper spray caused excruciating pain, and that it was designed to cause intense pain. (240 F.3d at 1199).

The Court also found that Judge Walker was incorrect when he found that the officers made no attempt to open the eyes of the plaintiffs. The truth is that anyone, Judges of the Court of Appeals, Judges of the District Court, lay persons, and reasonable persons can simply view the videotape and see that Judge Walker mis-stated the facts.

The Court of Appeals also found that Judge Walker was incorrect when he stated that the use of pepper spray was necessary in order to *quickly* remove the

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[3] *Headwaters Forest Defense v. Humboldt County*, 240 F.3d 1185 (1999).

protesters from the premises. The videotapes show that the protesters who "released" were permitted to remain at the site of the protest for quite some time after they released.

And the Court of Appeals also disagreed with Judge Walker's finding that the plaintiffs had failed to demonstrate that there were viable alternatives to using pepper spray.

Furthermore, as set forth in the attached Affidavit of Prejudice signed by plaintiff Lundberg, there are still other findings made by Judge Walker in his Order dismissing the case, filed October 26, 1998, that are shown by the videotapes to be demonstrably false.

Judge Walker presided over the first trial. He is a highly intelligent person who was able to see the same things that the judges of the Court of Appeals were able to see in the videotapes. The only explanation for the fact that Judge Walker made the factual findings that the Court of Appeals so soundly rejected is that he did so because of bias and prejudice against the plaintiffs and their claims. There can be no "innocent" explanation of Judge Walker's misstatements of fact.

The same is true as to still other findings cited in the Lundberg Affidavit wherein Judge Walker's recitations in his October 26, 1998 Order dismissing the case are contradicted by the evidence, including the videotapes. Judge Walker's findings that are contrary to demonstrable facts could only have been made because of bias and prejudice. At the very least, any reasonable person would so believe.

ORDER CHANGING VENUE

As to Judge Walker's *sua sponte* decision to transfer the re-trial to Eureka, it is respectfully submitted that the decision to transfer the trial to a community which Judge Walker knows to harbor intense feeling of hostility toward the plaintiffs could only have been motivated by bias and prejudice against the plaintiffs. Once again, there is no other reasonable explanation for Judge Walker's action.

That conclusion is supported by several facts:

1. There was no request by the defendants to move the trial to Eureka. The transfer was Judge Walker's own creation;

2. Judge Walker did not give plaintiffs any opportunity to be heard prior to his pronouncement;

3. Judge Walker indicated that he had decided to try the case in Eureka because there had been a hung jury in San Francisco. It is respectfully submitted that a hung jury/mistrial is not a proper basis for transferring the trial (particularly to a site that is hostile to plaintiffs);

4. Judge Walker failed to consider the convenience of the plaintiffs and their attorneys in his decision. He considered only convenience to (some) of the witnesses and to the defendants and their attorneys;

5. Judge Walker failed to respect the plaintiffs' choice of forum (despite the fact that in an unrelated case, (*Williams v. Bowman* 157 F.Supp.2d 1103 (ND Cal, 2001)), Judge Walker himself acknowledged that plaintiff's choice of venue was entitled to great weight);

6. Judge Walker failed to consider the great imbalance of financial resources between plaintiffs and defendants

in determining that he was going to try the case in Eureka;

7. Judge Walker decided to transfer the case to a site where jurors would face a conflict because, if they found for plaintiffs, the payment would, in effect, come from their own pockets;

8. Judge Walker decided to transfer the case to Eureka, knowing that the jurors in that community would likely favor the "home team" of local law enforcement officers, other officials, and attorneys for the defendants;

9. Judge Walker ignored the terms of Northern District General Order 44, which requires that the case be reassigned to another judge if it is moved to another courthouse.

The transfer of the trial to "timber country", rife with hostility toward plaintiffs and "their kind", as well as the circumstances surrounding the transfer to Eureka lead to only one conclusion: Judge Walker is biased and prejudiced against the plaintiffs. Furthermore, Judge Walker's conduct also demonstrates to a reasonable person that there is grave doubt as to his impartiality.

CONCLUSION

There can be no question that, pursuant to 28 U.S.C. 144, 28 U.S.C. 455, and Northern District of California Rule 3-15, Judge Vaughn R. Walker should be disqualified and recused from any further consideration of this case, and that the matter should be remanded to the Clerk of the Court for random assignment to another judge of this Court.

Respectfully submitted on behalf of all plaintiffs,

DENNIS CUNNINGHAM
BENJAMIN ROSENFELD
WILLIAM SIMPICH
J. ANTHONY SERRA

/s/ Robert Bloom
ROBERT BLOOM

April 14, 2003

[Certificate of Service Omitted in Printing]

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Defendants

PLAINTIFFS' AFFIDAVIT OF BIAS AND PREJUDICE AND CERTIFICATE OF COUNSEL (28 U.S.C. §144)

April 24, 2003

AFFIDAVIT OF VERNELL SPRING LUNDBERG

State of California)
) ss.
County of San Francisco)

VERNELL SPRING LUNDBERG, being duly sworn, deposes and states:

1. My name is Vernell Spring Lundberg. I am over 18 years old. I reside at 3163 Mission St., San Francisco, CA 94110 c/o Dennis Cunningham in San Francisco, California. I am fully competent to make this affidavit and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct.

2. I am one of the plaintiffs in this matter. I make this affidavit to disqualify the Honorable Vaughn R. Walker from this case on the basis of his bias or prejudice against the claims I and my co-plaintiffs make in this case.

3. The facts that cause me to believe that Judge Walker is biased against the plaintiffs in this case are as follows:

On October 26, 1998, after Judge Walker had presided over the first trial of this case, he granted the defendants' Motion to dismiss the case in a written opinion.

It is not the fact that Judge Walker dismissed the case that leads me to believe that he is biased and prejudiced. It is the findings and conclusions that he reached in his October 26, 1998 opinion which are completely contrary to, and unsupported by, the facts that were elicited at the trial that took place in his presence in 1998.

In his opinion, Judge Walker made the following findings:

(A) "The uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC as a pain compliance technique in arresting plaintiffs".

No person who is unbiased could possibly have come to the conclusion that the officers acted reasonably. In fact, as I understand the ruling of the Ninth Circuit Court of Appeals, that Court took issue with this particular finding by Judge Walker. No unbiased person could possibly believe that the officers who inflicted torture upon me and my co-plaintiffs acted reasonably.

(B) ". . . . the severity of the intrusion upon the arrestees' personal integrity was minimal".

It is clear to me that any person who could state that he believes, after seeing the videotapes of what was done to me and to the other plaintiffs and hearing testimony regarding this torture, that there was a minimal intrusion upon our personal integrity is an extremely biased person.

(C) ". . . . the testimony established that this risk was "protected against" by closing of the eyes, which of course was the state of the relevant plaintiff's eyes when sprayed.".

It is absolutely clear beyond any doubt that, simply by observing the videotapes of these events that there

were times when the eyes of the plaintiffs were open when the pepper spray was applied to our eyes. Only an extremely biased person could claim otherwise.

(D) ". . . plaintiffs failed to present any evidence that the officers had a viable alternative means for effecting arrest.".

Throughout the trial evidence was presented that the officers could have done what they had done many times before: used the Makita grinder to release the devices. There was also evidence that they could have simply waited us out. And there was evidence that they could have collectively carried us out of the premises where we were protesting. Only a biased person could ignore the fact that there was substantial evidence that the officers had more than one viable alternative.

(E) "The officers, before exposing plaintiffs to the threat of serious physical injury by cutting them out, opted instead to use first a pain compliance technique that posed no significant threat of physical injury to anyone present at the scene. No reasonable juror could conclude that this decision was unreasonable."

What this case is about is whether a reasonable jury could conclude that the decision of the defendants was unreasonable. Not only was Judge Walker reversed by the Court of Appeals as to this matter, as I understand their opinion, but Judge Walker's finding as to this question unequivocally reveals that he has formed an opinion against me and the other plaintiffs as to the basic issue in this case. I believe that this is the very essence of prejudice – a pre-judging – and that there is no way Judge Walker can be fair and impartial in this case.

(F) "The officers' decision not to use such a device [a Makita grinder] was unquestionably reasonable."

Again, Judge Walker has made clear that he believes that the defendants *unquestionably* acted reasonably by choosing not to use a grinder. At best, any unbiased person would acknowledge that there may be some dispute about the issue. Judge Walker has revealed how he feels. He has pre-judged this important issue.

(G) ". . . the videotape footage plainly demonstrates that the officers were not making any attempt to open plaintiffs' eyes."

Nothing could be further from the truth. Time after time, the officers are seen doing just that – attempting to open the eyes of plaintiffs. Only a biased person could state that what was plainly portrayed on the videotapes was not so portrayed.

(H) "Giving full credence to plaintiffs' factual testimony and to the reasonable inferences flowing from that evidence, this court concludes that, on the record of the case as tried and presented, there is no reasonable basis for jurors to find that the officers' use of OC was objectively unreasonable in light of the facts and circumstances confronting them."

As to this finding by Judge Walker, it is without doubt that he has pre-judged the central issue in this case. Not only is Judge Walker biased, but it is also clear that any reasonable person would conclude that Judge Walker is biased in this case.

(I) "In finding that there is no evidentiary basis for concluding that plaintiffs' arrests involved the use of excessive force, the court has determined as a matter of law that neither the officers nor, implicitly, the policies of defendants caused any deprivation of the plaintiffs' Fourth Amendment rights."

Again, Judge Walker has expressed his views regarding the central issue in the case. Judge Walker is biased and prejudiced against me and my co-plaintiffs.

On January 23, 2003, at a Case Management Conference, Judge Walker announced that he was going to have the re-trial of the case in Eureka, California. Based upon what I have observed and upon what my attorney and the other attorneys in the case have set forth in a Motion they are filing on Monday, April 14th, 2003, (which asks that the case be re-tried in San Francisco), it is clear to me that Judge Walker's decision to try the case in Eureka demonstrates his bias against me and my co-plaintiffs.

Certainly Judge Walker became aware long before January 23rd, 2003, of the extreme hostility that many citizens in timber country feel about environmental activists such as the plaintiffs in this case. In fact, Judge Walker presided over a trial at which the fact of the hostility was undeniable.

In my opinion, only an extremely biased judge would direct that we try this case in Eureka. Any person of reasonable intelligence understands that the hostility of the community makes it very very unlikely, if not impossible, for plaintiffs to achieve a unanimous verdict in Eureka. So many people are associated with the timber industry and/or have many friends and relatives whose livelihood is related to that industry that the feeling of hostility pervades Humboldt and the surrounding counties.

There is no question in my mind that Judge Walker is fully aware of the hostility in the community and that he has decided to try the case in Eureka so that the plaintiffs will not prevail. It is my belief that, human nature being what it is, Judge Walker hopes to be proven right as to his

finding that no reasonable jury could find for the plaintiffs in this case.

I am informed that at a hearing in this case with Judge Walker on March 27th, 2003, Attorney Tony Serra informed Judge Walker that he had recently been in Humboldt County and that tensions were very high and that local timber supporters, antagonists of environmentalists, were behaving in a physically threatening manner. Judge Walker made no effort to inquire further into the question of whether it would be a good idea to change his mind and return the case to San Francisco.

Judge Walker is fully aware that Humboldt jurors would be very reluctant to find for plaintiffs because they know that such a finding would be, in effect, a finding that they and their families would have to pay plaintiffs' damages.

And he is fully aware that local jurors would favor the local officers, defendants, and attorneys (as they would be likely to do anywhere in the country).

Judge Walker gave my attorney and the other attorneys no opportunity to be heard prior to his decision to move the trial to Eureka. Only a biased judge would behave in that manner.

I have read the Motion that plaintiffs' lawyers are filing with regard to the venue. There are so many arguments in that Motion that, in my opinion, demonstrate to me that Judge Walker is completely biased against our case. There is no escaping the clear conclusion that Judge Walker believes that the plaintiffs "got what was coming to them", and that it is this view that has prejudiced him against us. But, whatever the reason, it is clear to me, and I believe that it is clear to any person who knows the facts, that Judge Walker is ex-

tremely biased and prejudiced against me and the other plaintiffs.

I signed this affidavit on April 14, 2003, at San Francisco, California.

/s/ Vernell Spring Lundberg
VERNELL SPRING LUNDBERG

SUBSCRIBED AND SWORN TO BEFORE ME on April 14th, 2003

/s/ Rajeev Verma

[SEAL]
RAJEEV VERMA
Commission #1331008
Notary Public - California
Alameda County
My Comm. Expires Nov. 19, 2005

Notary Public in and for the State of California.
My commission expires NOV 19, 2005

CERTIFICATE OF COUNSEL

As required by the provisions of Section144 of Title 28 U.S.C., I, as counsel of record for Plaintiff Vernell Spring Lundberg, certify that this affidavit of prejudice is submitted in good faith and not for purposes of delay.

April 14 2003

/s/ Robert Bloom
ROBERT BLOOM
Attorney for Vernell Spring Lundberg

[Certificate of Service Omitted in Printing]

APPENDIX G

[Filed April 18, 2003]

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No.: C97-3989-VRW

HEADWATERS FOREST DEFENSE, et al.,

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO
MOTION TO RECUSE

I. INTRODUCTION

Untimely under any standard, plaintiffs fashion their motion to recuse this court around an almost childlike insistence that this case is about plaintiffs and their cause rather than the fundamental legal issue of what tools should policymakers allow to be available to entity officers to overcome resistance to arrest in the context of civil disobedience. The two fundamental prongs involve the notion that granting judgment as a matter of law following an initial trial somehow prevents the court from fairly presiding over a second trial following remand and the assertion that the situs of the trial should not be where plaintiffs' cause is unpopular to some or affected taxpayers reside.

Of course, no decision of a trial court is more often reversed than granting of judgment as a matter of law. The issue of whether the necessary modicum of evidence exists for a jury to resolve a factual question is always subject to some interpretation and it was acknowledged in a concurring opinion by a member of the Ninth Circuit Panel in this particular case to be a "close one" – although this comment was later deleted. As to their second point, it cannot be too often repeated that this case is simply not about plaintiffs' cause or the economic impact of that to the Humboldt County community. Indeed, unless we are to assume that the California Legislature insists upon bias in trial of cases against public entities, it is worth noting that any action against a public entity in the State of California must be tried in the county of the entity. (California Code of Civil Procedure §394.)

Thus, plainly wanting in factual basis, the lack of support in the statutory and decisional law for the position of plaintiffs is explored below.

II. THE MOTION SHOULD BE DENIED AS UNTIMELY.

Plaintiffs invoke Section 144 and Section 455(b)(1) of Title 28 U.S.C. in support of recusal, claiming bias and prejudice.

Preliminarily, it should be noted that a motion for recusal is committed to the discretion of the district judge, and the denial of such a motion will only be reversed upon the showing of an abuse of such discretion. *U. S. v. Rogers,* 119 F.3d 1377, 1380 (9th Cir. 1997); *E. & J. Gallo Winery v. Gallo Cattle Co.,* 967 F.2d 1280, 1295 (9th Cir. 1992); *In Re Drexel Burnham Lambert, Inc.,* 861 F.2d 1307, 1312 (2nd Cir. 1988) ("discretion is confided in the district judge in the first instance to determine whether to disqualify himself."); *Apple v. Jewish Hosp. And Med. Ctr.,* 829 F.2d 326, 333 (2nd Cir. 1987); see also, Schwarzer, W., et al., *Federal Civil Procedure Before Trial,* p. 16-109. Furthermore, a substantial burden is imposed on the party claiming bias or prejudice as a basis for recusal to prove that this is the case. *United States v. Zagari,* 419 F.Supp. 494, 501 (N. D. Cal. 1976); Schwarzer, *Id.*

Section 144 provides that a judge shall be disqualified when he has "a personal bias or prejudice either against [a party] or in favor of any adverse party." 28 U.S.C. § 144. Under Section 144, the party moving for recusal must file a *timely* and *legally sufficient* affidavit stating "the facts and the reasons for the belief that bias or prejudice exists." *Id.* If the judge to whom a timely motion and accompanying affidavit is directed determines that the affidavit specifically alleges facts providing grounds for recusal under Section 144, the legal sufficiency of the affidavit will be deemed established,

and a different judge must be assigned to hear the merits of the recusal motion. *Id.*; *U. S. v. Sibla,* 624 F.2d 864, 867 (9th Cir. 1980). On the other hand, if the sitting judge finds the affidavit legally insufficient, recusal should be denied. 28 U.S.C. §144.

Section 455 requires a federal judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, including instances where the judge has a personal bias or prejudice against any party. 28 U.S.C. §455(a) and §455(b)(1).

As a threshold matter, a motion for recusal for bias or prejudice under Section 144 or Section 455 must be "timely." The threshold timeliness requirement is both well established and strictly enforced in the Ninth Circuit and elsewhere. *In Re Anwiler,* 958 F.2d 925, 930 (9th Cir. 1992); *In Re International Bus. Mach. Corp.,* 45 F.3d 641, 643 (2nd Cir. 1995) ("First, a prompt application affords the district judge the opportunity to assess the merits of the application before taking any further steps that may be inappropriate for the judge to take. Second, a prompt application avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters."); *E. & J. Gallo Winery, supra,* 967 F.2d 1280, 1295 (9th Cir. 1992) (applying timeliness requirement to Section 455 recusal motion); *Preston v. United States,* 923 F.2d 731, 733 (9th Cir. 1991) (a Section 455 recusal motion must be filed "with reasonable promptness after the ground for such a motion is ascertained."); *Willner v. University of Kansas,* 848 F.2d 1023, 1028 (10th Cir. 1988) (listing cases from other circuits that recognize threshold timeliness requirement under Section 144 and 455).

The Ninth Circuit has warned that a recusal motion made after the entry of judgment is *presumptively untimely*. *E. & J. Gallo Winery, supra,* 967 F.2d at 1295 (recusal motion made after entry of judgment was untimely; "[t]o hold otherwise would encourage parties to withhold recusal motions, pending a resolution of their disputes on the merits, and if necessary invoke Section 455 in order to get a second bite at the apple."); *Rogers, supra,* 119 F.3d at 1382, 83 (motion for recusal untimely when criminal defendant was aware of purported bias "several months" before his resentencing hearing); *United States v. Bell,* 79 F.Supp.2d 1169, 1172 (E. D. Cal. 1999) (quoting *E. & J. Gallo Winery*); *First National Bank of Peoria v. Muller,* 851 F.2d 916, 919 (7th Cir. 1988); *National Auto Brokers Corp. v. General Motors Corp.,* 572 F.2d 953 (2nd Cir. 1978) (affidavit of prejudice not timely where it was based on facts that were a matter of public knowledge for years and were known to counsel four months before the recusal motion was filed); *Universal City Studies, Inc. v. Reimerdes,* 104 F.2d 334, 349 (D.C.N.Y. 2000) (delay of four months rendered Section 144 recusal motion untimely); *Travelers Inc. Co. v. Liljeberg Enterprises, Inc.,* 38 F.3d 1401 (5th Cir. 1994) (motion for relief of judgment based on bias and prejudice untimely when made three months after the movants learned of the facts giving rise to the motion and a year after judgment was entered in two of the three cases).

According to plaintiffs' motion and affidavit, plaintiffs became aware of this court's alleged bias and prejudice when the court issued its opinion granting judgment as a matter of law. This decision was filed on October 26, 1998. Following the Ninth Circuit's first decision reversing judgment, the case was remanded to

this court on March 5, 2001.[1] Defendants' second petition for writ of certiorari was denied on November 4, 2002.

At the time the second writ of certiorari was denied, plaintiffs, by their own account, had been aware of this court's supposed prejudice and bias for more than *four years* – yet failed to take any action towards recusal. Plaintiffs did not file a notice to recuse when the case was remanded. Plaintiffs did not file a motion to recuse following denial of defendants' petition for certiorari on November 4, 2002. Plaintiffs made no motion to recuse before the case management conference held on January 24, 2003. Instead, the plaintiffs filed a motion for summary judgment in an attempt to dispose of the case. Plaintiffs made no mention of a motion to recuse at the hearing on the motion for summary judgment on March 27, 2003. Rather than bringing the motion, "at the earliest possible moment after obtaining facts demonstrating a basis for recusal," *Bell,* 79 F.Supp.2d at 172, or "with reasonable promptness after the ground for such a motion is ascertained," *Preston, supra,* 923 F.2d at 733, plaintiffs waited until April 14, 2003 – ten days before the pre-trial conference – to bring the motion.

Under the authority cited above, plaintiffs' motion for recusal fails to meet the threshold test of timeliness, and should therefore be denied.

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[1] Docket Number 214.

III. THE COURT'S RULINGS IN THIS CASE DO NOT PROVIDE A SUFFICIENT BASIS FOR RECUSAL.

Even assuming for the sake of argument that plaintiffs' motion can somehow be considered "timely," it should be denied because no legally sufficient basis to support a finding of bias or prejudice has been provided. Recusal under either Section 144 or Section 455(b)(1) is required only if the judge's bias is (1) directed against a party; (2) stems from an extrajudicial source; and (3) casts doubt on his or her impartiality. See *Liteky v. United States*, 510 U.S. 540, 546 (1994); *U.S. v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986).

In *Liteky*, the Supreme Court held that there is no basis for recusal where a judge's opinions are based on matters learned in earlier proceedings:

> "[n]ot subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Id.*, 510 U.S. at 551.

Such opinions can *never* be considered "extrajudicial" and cannot provide the basis for recusal because the judge's "knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings . . ." *Id.*

The court in *Liteky* further held that judicial rulings or opinions "almost never constitute a valid basis for a bias or partiality motion . . . almost invariably, they are proper grounds for appeal, not for recusal." *Id.*, 510 U.S. at 555. Judicial rulings can only in "the rarest circumstances" provide a basis for a recusal motion, and

only unless "they display a deep seeded favoritism or antagonism that would make fair judgment impossible." *Id.* The court cited as an example of such a circumstance the comment made by the district judge in *Berger v. United States*, 255 U.S. 22 (1921), a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id.* at 28.

Plaintiffs' motion for recusal is premised on (1) the court's order of October 26, 1998, granting judgment as a matter of law to defendants and (2) the court's "Order Changing Venue."

Plaintiffs' motion fails to pass either the "extrajudicial source" or "deep seeded antagonism" test set forth in *Liteky*.

A. Order Granting Judgment As A Matter Of Law.

To begin with, the legal insufficiency of plaintiffs' motion for recusal is manifest because both the order granting judgment as a matter of law ("JMOL") and the "change of venue" order are based solely on information acquired "in earlier proceedings," i.e., the first trial. Under *Liteky*, the basis for recusal offered by plaintiffs is insufficient *per se*. *Liteky*, 510 U.S. at 551 ("Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings.")

In any case, neither of the cited rulings "display a deep seeded favoritism or antagonism" justifying recusal under the *Liteky* standard.

Reversal of the court's order granting JMOL, in and of itself, is patently insufficient to support recusal. None

of the Ninth Circuit decisions indicated, either expressly or impliedly, that the trial court was biased or prejudiced. Indeed, Judge Bright, in his concurring opinion, admitted that: "This is a close call." *Headwaters v. County of Humboldt,* 211 F.3d 1121, 1144 (9th Cir. 2000). Had the Ninth Circuit panel believed that the trial court was biased or prejudiced against the plaintiffs, it had the authority under 28 U.S.C. §2106 to direct that the case be reassigned to a different judge on remand. The fact that the appellate court did not re-assign on remand indicates that the panel did not share plaintiffs' opinion that: "the bias and prejudice is clearly revealed by particular findings that are set forth in Judge Walker's decision, filed October 26, 1998. . ." The Ninth Circuit merely found that, "viewing the evidence in the light most favorable to plaintiffs," disputes in historical fact required jury determination.

Plaintiffs take issue with specific findings in the JMOL as proof of bias and prejudice. For example, plaintiffs argue that the trial court was incorrect when it concluded that "the severity of the intrusion upon plaintiffs' personal integrity was minimal," citing the first Ninth Circuit court opinion (which was vacated by the Supreme Court). Plaintiffs ignore the videotaped interview of plaintiff Vernell "Spring" Lundberg taken shortly after one of the pepper spray incidents in which Ms. Lundberg showed absolutely no signs of any ill-effects from pepper spray and vowed to return to the forest to continue her "direct actions." Plaintiffs also ignore that there was not one shred of evidence presented in the first trial that any plaintiff required medical attention after exposure to pepper spray. Indeed, all involved law enforcement officers had been exposed to "full

bursts" of pepper spray as part of their certification to use it.[2]

In short, the mere fact that the Ninth Circuit panel disagreed with various statements in the JMOL falls far short of establishing "deep seeded favoritism or antagonism that would make fair judgment impossible," as contemplated in *Liteky*.

B. Order Changing Venue.

To begin with, and as set forth in defendants' opposition to plaintiffs' Motion "Re Situs of Trial," the trial court did not direct a change of "venue." This case remains in the San Francisco Division of the Northern District Court. There has been no intradivision transfer and no intradistrict transfer.[3] The fact that the physical location of the courtrooom has changed to Eureka is entirely consistent with 28 U.S.C. §84, which provides, *inter alia,* that the "court for the Northern District shall be at Eureka, Oakland, San Francisco and San Jose."

Plaintiffs list nine points regarding the "venue change" which supposedly demonstrate bias and prejudice, which are addressed below:

1. "There was no request by the defendants to move the trial to Eureka. The transfer was Judge Walker's own creation." Plaintiff's cite no authority for the proposition that a change of courtrooms must be preceded by a

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[2]Oliver Sansen testified to more than thirty such personal exposures as part of the training he conducts.

[3]Civil Local Rule 3-2 provides in pertinent part that "all civil actions which arise in the counties of . . . Humboldt . . . shall be assigned to the San Francisco or Oakland Division," and authorizes a chance of venue motion when "a civil action has not been assigned to the proper division within this district . . ."

request by a party. There has been no change of venue under any statute or rule.

2. *"Judge Walker did not give plaintiffs any opportunity to be heard prior to his pronouncement."* Plaintiffs ignore the fact that the court attempted to procure a courtroom in Eureka *for the first trial.* (See Declaration of Nancy K. Delaney filed herein.) The possibility of the second trial being held in Eureka should have come as no surprise to the plaintiffs or their attorneys. Furthermore, at the January, 2003, case management conference, the court invited the plaintiffs to file a motion with respect to the location of the trial. (Dec. of Delaney.)

3. *"Judge Walker indicated that he had decided to try the case in Eureka because there had been a hung jury in San Francisco. It is respectfully submitted that a hung jury/mistrial is not a proper basis for transferring the trial (particularly to a site that is hostile to plaintiffs)."* The court has never indicated that the case should be tried in Eureka "because there had been a hung jury in San Francisco." (See Declaration of Nancy K. Delaney.) As indicated above, the court unsuccessfully attempted to conduct the first trial in Eureka. This attempt was unsuccessful because a suitable courtroom was not available. (*Id.*).

4. *"Judge Walker failed to consider the convenience of the plaintiffs and their attorneys in his decision. He considered only convenience to (some) of the witnesses and to the defendants and their attorneys."* There can be no question that the majority of the witnesses and parties, including ***plaintiffs***, in the case reside in Humboldt County. There is also no question that lodging and related expenses would be far greater in San Francisco than in Eureka.

5. "Judge Walker failed to respect the plaintiffs' choice of forum (despite the fact that in an unrelated case, (Williams v. Bowman, 157 F.Supp.2d 1103 (ND Cal. 2001)), Judge Walker himself acknowledged that plaintiff's choice of venue was entitled to great weight)." Again, there is no "choice of venue" issue. This case remains in the San Francisco Division of the Northern District, and is being tried at a site authorized by 28 U.S.C. §84. Plaintiffs filed their complaint in the Northern District, San Francisco Division, and that is where it is being tried.[4]

6. "Judge Walker failed to consider the great imbalance of financial resources between plaintiffs and defendants in determining that he was going to try the case in Eureka." As indicated above in response to item 4, the costs of lodging and related expenses is far greater in San Francisco than in Eureka. The net effect of a trial in San Francisco is that more witnesses and more parties will incur greater expenses. Defendants incurred these expenses in the first trial.

7. "Judge Walker decided to transfer the case to a site where jurors would face a conflict because, if they found for plaintiffs, the payment would, in effect, come from their own pockets." Following plaintiffs' reasoning, no trial should ever be held in a community in which the events occurred. In fact, this is the norm, and is reflected in all statutes and rules concerning venue. The County of Humboldt (and Eureka) are within the San Francisco Division of the Northern District, and potential jurors

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[4] In fact, this court's opinion in *Williams* is entirely consistent with the decision to hold the trial in Eureka. See, Defendants' Opposition to Plaintiffs' Motion "Re Situs of Trial," p. 2:11-22.

may be selected from any Northern California county. (See Northern District General Order 6 regarding selection of jurors.)

8. "Judge Walker decided to transfer the case to Eureka, knowing that the jurors in that community would likely favor the "home team" of local law enforcement officers, other officials, and attorneys for the defendants." This statement constitutes pure speculation and conjecture. It could just as easily be hypothesized that Humboldt County represents plaintiffs "home turf," as most of the plaintiffs reside in the Humboldt County area, as do other members of EarthFirst!. (The fact that the Humboldt County District Attorney recently filed a criminal complaint against Pacific Lumber also casts doubt that Eureka represents the defendants "home turf.")

9. "Judge Walker ignored the terms of Northern District General Order 44, which requires that the case be re-assigned to another judge if it is moved to another court." General Order 44 is clearly inapplicable. Plaintiffs reference General Order 44, subdivision (E)(3) in the "Motion Re: Situs of Trial." This provision 15 entitled "Intra-District Reassignment of Cases," and instructs that the clerk "shall randomly reassign the case to a Judge designated to hold court at the receiving Courthouse." As discussed above and defendants' opposition to plaintiffs' "Situs of Trial" motion, there has been no intradistrict reassignment. Nor has there been an intradivision reassignment. The case remains where it was filed by the plaintiffs, i.e., in the San Francisco division of the Northern District. Reassignment to another judge because the case is being tried in Eureka is not authorized.

IV. CONCLUSION

For all of the above-stated reasons, plaintiffs' motion for recusal should be denied.

DATED: April 18, 2003

MITCHELL, BRISSO, DELANEY & VRIEZE

By: /s/ Nancy K. Delaney
Nancy K. Delaney
William F. Mitchell
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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No.: C97-3989-VRW

HEADWATERS FOREST DEFENSE, et al.,

Plaintiffs,

vs.

COUNTY OF HUMBOLDT, et al.,

Defendants.

DECLARATION OF NANCY K. DELANEY
IN OPPOSITION OF MOTION TO RECUSE

I, NANCY K. DELANEY, declare:

1. That I am a member of the firm of Mitchell, Brisso, Delaney & Vrieze, the attorneys of record for defendants herein;

2. That prior to the first trial in this matter, and, in fact, before the first trial was scheduled, defendants requested that the situs of trial be the City of Eureka;

3. That an investigation revealed that the federal courtroom currently available was unavailable at that time and efforts to schedule the first trial in Eureka included exploration of whether a state, superior court facility could be used;

4. That no state facility was available at the time and that I was personally informed of this by the Honorable J. Michael Brown, then Presiding Judge of the Humboldt County Superior Court;

5. That at no time did the Court suggest that a "hung jury" in San Francisco was the reason for the situs of the trial being at the federal facilities in the City of Eureka;

6. That subsequent to the first trial in this matter, the federal facilities became available and a case then pending before the Honorable Thelton Henderson was transferred for trial to the federal facility and trial was concluded in Eureka, California;

7. That it has never been the position of defendants that this case is about "environmental issues" and defendants have made every effort to clarify that the issue is law enforcement response to resistance of arrest in the context of civil disobedience – whatever the cause of the activist – rather than the relative merits of any controversy between Pacific Lumber Company and environmental interests;

8. That I have personally observed many, many media appearances by plaintiffs wherein it was apparent that the efforts of plaintiffs were to attempt to exploit the underlying events to further exposure to their cause, however,

defendants have always maintained that the case should be resolved in the courtroom, not through the media.

I declare under penalty of perjury that the foregoing is true and correct pursuant to the laws of the State of California, that I could competently testify to the foregoing and that this declaration was executed on April 18, 2003, at Eureka, California.

/s/ Nancy K. Delaney
NANCY K. DELANEY

APPENDIX H

Jason Hoppin,
"9th Circuit Yanks Judge From Pepper Spray Case,"
The Recorder, September 4, 2003

In what lawyers believe may be a first, the 9th U.S. Circuit Court of Appeals has removed a judge before a trial – in this case, U.S. District Judge Vaughn Walker – for displaying bias in the courtroom.

The 9th Circuit has removed judges twice before, but those cases involved events outside the courtroom: In one case, the judge had a financial conflict, and in another, he referred to the defendants as "Commies."

In this case, a three-judge panel was upset that Walker decided to hold a high-profile case over the use of pepper spray against logging protesters in Eureka, Calif., where plaintiffs say they can't get a fair trial.

"On [the] record it appears the district court's actions reveal an appearance of an absence of impartiality sufficient to warrant reassigning this case," reads the unsigned order. Judges Harry Pregerson, William Fletcher and 8th Circuit Senior Judge Myron Bright were on the panel.

On rare occasions, the 9th Circuit will order that a case be reassigned on remand. But it almost never removes a judge in the middle of proceedings, as it did Tuesday in an unpublished order.

In a 1997 Superfund case, plaintiffs had asked the 9th Circuit to disqualify Senior U.S. District Judge Andrew Hauk for, among other things, calling their experts "pointyheads." But the 9th Circuit declined to remove the irascible judge.

Walker was presiding over 6-year-old allegations that officials in Humboldt County, Calif. unlawfully used cotton-tipped swabs to dab pepper spray into the eyes of logging protesters on three occasions.

Plaintiffs' attorneys have struggled with Walker almost from the beginning of *Headwaters Forest Defense v. Humboldt County*, 97-3989. He entered judgment for the defense after an earlier jury deadlocked 4-4.

The same 9th Circuit panel reversed and sent the case back to Walker, who decided to hold the retrial in Eureka. But as plaintiffs' lawyers and the 9th Circuit noted, it's been 30 years since a federal case was tried in a courtroom there. The panel also noted the plaintiffs' concern that the case could be doomed in that venue since the livelihoods of many in the area are tied to the logging industry.

After complaints that he should step aside, Walker's handling of the case was reviewed by U.S. District Judge Phyllis Hamilton. She found no bias.

"The weird thing about this is it's based on his ruling; it's not based on anything he said or did outside the courtroom or the case," said William Mitchell of Eureka's Mitchell, Brisso, Delaney & Vrieze, who represents the defendants in the case.

The panel's order is an affront not only to Judge Walker, but to every district court judge sitting in the 9th Circuit," Mitchell said. Plaintiffs' lawyers were ecstatic.

"We need a unanimous jury, and the jury pool there is contaminated, for lack of a better word, with people who have such strong ties to the logging industry," said plaintiffs lawyer Benjamin Rosenfeld. Plaintiffs lawyer Tony Serra said he was surprised Walker is off the case.

"I expected only half of it, to tell you the truth. I thought we were strong on what I would call the judge's sua sponte change of venue order," Serra said. "I kind of reasonably expected that would change, but they went all the way."

University of Pittsburgh law professor Arthur Hellman, who has written a book on the history of the 9th Circuit, said he can't recall a similar ruling – especially since writs of mandamus are notoriously difficult to win.

But, Hellman added, if Walker was going to be booted at all, it is probably best to do it before a second trial.

"You really don't want to do that again and then have to throw it out," Hellman said.

Lawyers for the protesters cited incidents of hostility toward anyone connected to the environmental movement, including lawyers, as one reason the case should not be held in Eureka.

"I'm kind of hippified, and you go up there, you see them loggers and man, they want to fucking fight you in the street," Serra said.

Serra said Walker's intelligence is "off the charts" and called Walker, who supports the legalization of drugs, "one of my heroes." But he said Walker should have stepped aside graciously.

"He followed the wrong star, let's just say that," Serra said.

(2)

Supreme Court, U.S.
FILED
FEB 19 2004
OFFICE OF THE CLERK

No. 03-1032

In The Supreme Court of the United States

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED RESTATED

Whether the action of the Court of Appeals, in setting aside the *sua sponte* transfer and directing re-assignment of the case, on finding an appearance of bias created by the transfer, raised any concern which warrants the supervisory attention of this honorable Court; and, if so, whether the court below was not correct, as well as wholly within its discretion – in circumstances where the 1998 dismissal order by the district judge, which the Court had reversed, reflected untoward prejudice against the plaintiffs – in concluding that the transfer of the trial to a place rife with antagonism to plaintiffs created an appearance of bias?

PARTIES TO THE PROCEEDING

Petitioners

County of Humboldt, California; Sheriff Dennis Lewis; Chief Deputy Gary Philp; and the City of Eureka, California.

Respondents

Vernell "Spring" Lundberg; Noel Tendick; Terri Slanetz; Eric Samuel Neuwirth; Lisa Sanderson-Fox; Maya Portugal; Jennifer Schneider; and Michael McCurdy. Headwaters Forest Defense is no longer a party to this action.

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STATEMENT OF THE CASE AND QUESTION PRESENTED RESTATED

Respondents sued the Sheriff of Humboldt County, petitioner Lewis, his chief deputy, petitioner Philp, the County, and the City of Eureka, California, under 42 U.S.C. § 1983, for damages arising from police actions against them on three occasions in the Fall of 1997. There – supposedly to get them to release themselves from 'lock-box' devices, with which they sought to prolong sit-ins they conducted to protest destructive corporate logging practices in the region – the officers, on the orders of petitioners and as a matter of County and City policy, swabbed pepper spray liquid directly on the protesters' faces, in and around the eyes, causing excruciating pain, despite the lack of any resistance; in many cases relief from flooding water rinse was also withheld for long periods. A small minority released themselves in response to this cruelty.

The case was assigned to the Hon. Vaughn R. Walker, D.J., in the Northern District of California, and came on for trial in San Francisco, in July, 1998. The Court had granted qualified immunity to the several officers who had done the actual swabbing – graphically depicted in videotapes, which were played on television news all over the world – and held only the 'policy defendants' (petitioners here) to answer. The Court then granted qualified immunity to the Sheriff and his chief deputy also, at the close of plaintiffs' case, and submitted the claims against the County and the City to the jury.

The jury deadlocked, four to four, and were discharged, and the Court declared a mistrial, saying the issue of excessive for in the case was "a simple and straightforward one. . . . It's obvious one on which reasonable people can

differ".[1] Eight weeks later, however, the Court entered an Order vacating the trial date and dismissing the case, holding that, "The plaintiffs' claims are legally untenable . . . ," and observing that, "[T]he jury's inability to reach a verdict does not necessarily indicate that reasonable minds could differ . . . " 1998 WL 754575 (N.D. Cal.), p1.

An appeal followed, in which a panel of the Ninth U.S. Circuit Court of Appeals roundly reversed the dismissal and the grant of qualified immunity to the individual petitioners (where the grant to the officers who did the actual swabbing was not appealed), and ordered a new trial. *Headwaters Forest Defense, et al. v. County of Humboldt, et al.*, 240 F.3d 1185 (9th Cir. 2000) ("*Headwaters I*") The petitioners sought certiorari in this Court, shortly after its decision in *Saucier v. Katz*, 533 U.S. 194 (2001), establishing a mandatory routine for testing claims of qualified immunity in excessive force cases; accordingly, this Court sent the case back to the Circuit Court for re-determination under *Saucier*. 122 S.Ct. 24 (2001).

The court below affirmed its previous ruling with a second opinion – incorporating by reference its analysis of the facts in the first, *Headwaters Forest Defense, et al. v. County of Humboldt, et al.*, 276 F.3d 1125 (9th Cir. 2002) ("*Headwaters II*") – and this Court declined further review. 123 S.Ct. 513 (2002). The undersigned entered the case as new counsel, and attended an off-the-record status conference with Judge Walker on January 23, 2003, in which the Judge announced, *sua sponte*, that the case would be tried

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[1] See the Court of Appeals' recusal order, Petitioners' Appendix A, p2a.

in Eureka, where there is a federal courtroom in the post office, sometimes used by a magistrate. Eureka has been the epicenter of anti-logging protests in the area over a period of many years, and was at the time a hotbed of controversy over the strategy and tactics – including various forms of civil disobedience such as the 'lock-box' sit-ins – pursued by Earth First! Earth First! is a long-established, activist environmental defense movement plaintiffs were part of, attempting to stop clear-cutting in northern California and save the old trees, the watersheds, the fishing industry, the local economy, etc. As everyone knew, this was not a good place to go in search of an impartial jury. See plaintiffs' petition below, *post*, App. A, p11-16.

Plaintiffs said that to the district court informally at the next status conference, in March, but were rebuffed. Having studied the district court's 1998 order of dismissal in the meantime, we sought recusal, as well as transfer of the trial back from Eureka, in a mandamus petition, and we asked that it go back to the panel who heard the appeal. It did, relief was granted on both counts, and the instant petition follows.

Fairly and properly framed then, the issue presented is:

> Whether the action of the Court of Appeals, in setting aside the *sua sponte* transfer and directing re-assignment of the case, on finding an appearance of bias created by the transfer, raised any concern which warrants the supervisory attention of this honorable Court; and, if so, whether the court below was not correct, as well as wholly within its discretion – in circumstances where the 1998 dismissal order by the district

judge, which the Court had reversed, reflected untoward prejudice against the plaintiffs – in concluding that the transfer of the trial to a place rife with antagonism to plaintiffs created an appearance of bias?

RESPONSE TO PETITIONERS' STATEMENT

Numerous assertions in defendant-petitioners' "Statement" require response. They begin with calumny against Earth First!, the movement plaintiffs were (and are) part of, and acted with in staging the sit-ins where they were brutally mistreated by police as complained of herein, calling it "a world-wide movement that advocates and practices criminal actions." (Petition, p2) They add a footnote, gratuitously advising the Court that Earth First! adherents were also involved in the protests against the World Trade Organization in Seattle several years ago (where, like these plaintiffs, they were also victims of lawless police assaults). Such statements should be understood as attempts to evoke the same bias which, as it played out in the district court, is the subject matter of the case.

Next, more substantively, there is the smooth narrative assertion that, at each of the three protests in question, "the on-scene officer in charge determined that the tactical use of OC (*sic* – they *never* refer to it as pepper spray) was the safest means of accomplishing the arrests." (Id.) This must be understood as defendant-petitioners' (false) version of what happened, in circumstances where plaintiffs' evidence is that the on-scene officers proceeded according to a pre-set decision and plan, by their individual defendant-petitioner commanders, to attack the

self-same Earth First! movement in Humboldt County with torture tactics, in the attempt to break it of this increasingly effective and productive sit-in practice.

We also disagree that the district court's invitation to plaintiffs to file a motion concerning their misgivings about having the trial in Eureka was made at the January conference (Petition, p4, ¶ 5.) Rather, the invitation came at the next status call, on March 27, 2003, after co-counsel J. Tony Serra asked the court to reconsider its Eureka plan, describing his own and others' experience with the level of ill feeling plaintiffs could expect to encounter in Humboldt. It was only after Serra's informal plea was spurned, that we reluctantly began to divert energy and resources from the impending trial into a move for mandamus relief; in preparing it, and considering the 1998 dismissal order in light of what we had learned about the evidence, we saw that the judge was disqualified by bias, and had to be recused.

Also, we cannot let pass without comment the would-be slam defendants take at plaintiffs for Tony Serra's earlier fiery statement to the press, promising a "political trial" – the very idea of which defendants purport to be so scandalized by – and for one plaintiff's affirmation that San Francisco would provide a needed "international forum" for the issues in the case. (Petition, p5, ¶ 1.) So, we comment: the notion that there is anything wrong with those statements, or the sentiments or intentions (or hopes) expressed in them, is un-American.

Continuing, it must also be noted that defendant-petitioners do say, and acknowledge, that the claim of bias was based on the 1998 purported Rule 50 dismissal (and the unexampled skein of false facts and mis-impressions it

was constructed upon), *and* the *sua sponte* transfer (Petition, p5, ¶ 3.); later, they say the Court of Appeals' order was based only on the transfer. (Id., p7) ("Incredibly, the panel's recusal order is based on a single ruling . . . "). Precisely what happened was that the "single ruling" showed the district judge was still operating out of bounds, and so 'the panel' issued its writ, to protect the integrity of its earlier decision(s).

In taking this action, however rare it might be, the Circuit Court was not obliged to expatiate on the intricacies of its earlier rigorous attentions to the words and actions of the district judge in disposing of the case in 1998, and their meaning in the sequel arising from the outlandish transfer; it was obviously free to stick to bare bones in its mandamus order. Neither was 'the panel' barred from reassembling to deal with the matter, or required to refer it *en banc* (as defendant-petitioners backhandedly concede; see Petition, p17, n.12; p18). Those matters were, and belonged, completely in the wisdom and discretion of 'the panel', following its case administratively as it were, to make sure it didn't go off track again. In this connection, the idleness of defendants' further protest, that they were not allowed 'input' on a purported issue of whether this new plea by plaintiffs should "come back" before the panel, and that the panel grabbed the case with undue haste (id. p6, ¶ 5), just shows how natural, inevitable and essentially ministerial those actions were. The

same goes for the decision to dispense with *en banc* inquiry. See Rule 35, F.R.A.P.[2]

Clearly, in the Court's mind, none of those things were needed; they saw through the district court's maneuver, and understood what it meant. The 'extremely rare' case, that 'almost never' happens, had happened. There was no hesitation, because the underlying demonstration of bias in the October Order was so unmistakable, categorical, overwhelming. The matter was cut and dried. To go to the end of petitioners' Statement, on p7, where they refer to the response of 'a noted Ninth Circuit historian' to the order appealed from, the more one reads the dismissal order, and the work of the Court of Appeals in *Headwaters I* undressing it, the more one sees that the "unheard of" had to be heard.[3]

REASONS TO DENY THE PETITION

The claims petitioners raise are far from anything which might legitimately engage the attention of this

[2] "The rule that a vote will not be taken as a result of the suggestion of the party unless requested by a judge . . . is intended to make it clear that the suggestion of a party as such does not require any action by the court. See *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U.S. 247, 73 S.Ct. 656 (1953)." R.35, F.R.A.P., Advisory Committee Notes, 1967.

[3] This is something this Court can see for itself, and marvel at, in the analytic bright light of *Headwaters I*; if it will, it can also use the moral light of the videotapes, which can be made available on short notice if there's any question about what actually happened, and what was done to plaintiffs by the police on the Orders and under the Official Policy of these petitioners.

Court, under its rules.[4] For all intents and purposes, their complaint concerns only the Circuit Court's application of its own rules and procedures, and discretionary interpretation, and vindication, of its own prior decision(s). In circumstances where defendant-petitioners have managed to pointlessly and expensively drag out the proceedings in two courts below for years, long past a decisive determination by the Court of Appeals that they were wrong in the case-in-chief, and hadn't a legal or factual leg to stand on, this honorable Court should make short work of this latest dilatory maneuver.

Defendant-petitioners make much of the copious literature showing that recusal by the appellate court in the course of a case is seldom called for, and this is true; but the extreme prejudice shown by the district court is what is really rare. As we showed in our petition to the Circuit Court, the *sua sponte* transfer to the Eureka hotbed for trial was not the 'sole basis' for the conclusion that he was biased. Rather, it was a crowning transgression, confirming the continuing, active, threatening presence of the virulent bias displayed in his 1998 dismissal order, which led to his disqualification.[5]

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[4] See, Rules of the Supreme Court of the United States, Rule 10, "Considerations Governing Review On Certiorari."

[5] In addition, Plaintiffs protested, and adduced, the court's announced (wrongful and prejudicial) intention to submit the issue of qualified immunity, already decided against defendants by the Court of Appeals, to the jury (plaintiffs' petition, *post*, App. A, p21; we also protested the court's failure to honor the plaintiffs' choice of forum, and its 'blind eye' to the district court's General Order 44(E)(3), which provides: "Whenever a civil or criminal case is transferred from one courthouse to another, the Clerk shall randomly re-assign the case to a

(Continued on following page)

Certainly the court below was as well aware as petitioners of the strength of the principle forbidding recusal based on prejudice shown within the proceedings, *except in the most severe case*; it is "almost never" appropriate, in this Court's words.[6] But, once in awhile it *is* appropriate, and necessary, and the Circuit Court – quite logically and appropriately acting through the panel which was met with the original affront – has duly determined that this is such a time. We submit that is strictly their business, as a supervisory matter – and really a question of the Court enforcing its own decision – where it had made quite plain to the district judge, in two decisions reversing him, just how far out of bounds he had gone. See, *Headwaters I, supra; Headwaters II, supra.*

I.

Defendant-petitioners, in asking this Court to restore their unfair advantage going into the re-trial, raise four claims against the action taken by the Court of Appeals in response to the emergency petition by plaintiffs on the eve

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Judge designated to hold court at the receiving Courthouse." See *post*, App. A, p21).

[6] This Court had its last word on this subject in *Liteky v. United States*, 510 U.S. 540 (1994): "[J]udicial rulings alone *almost never* constitute a valid basis for a bias or partiality motion. . . . [They] can only *in the rarest circumstances* evidence the degree of favoritism or antagonism required [for recusal] . . . [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion *unless* they display *a deep-seated favoritism or antagonism that would make fair judgment impossible.*" 510 U.S. 555 (Emphasis added).

of trial; in each, they insist the court below exceeded its authority or abused its discretion:

> + That the court recused the district judge on finding an appearance of bias, and reversed his order transferring the case to Eureka for trial;
>
> + That it did so in violation of normal rules governing grants of extraordinary relief (and, although they don't make a Point of it, in derogation of an order by another judge of the district, denying that relief);
>
> + That it did so by and through the same judges who had heard the earlier substantive appeal, and granted the new trial now ordered to Eureka – thereby unconscionably permitting plaintiffs to 'select their own panel'; and,
>
> + That that very panel wickedly refused to circulate their petition for re-hearing *en banc*.

It is true the Court did all these things, but they were right to do so; and, more to the point, they were entirely within their discretion, and shouldn't be subject to second-guessing in these premises. As noted, the January, 2003, status conference absolutely began with Judge Walker's smiling announcement, as he settled fraternally into his seat with us at counsel table for the off-the-record discussion, that, "We're going to try this case in Eureka." As new counsel, we weren't immediately aware of just how bad an idea this was; some in the plaintiffs' movement looked on it as a good thing – guaranteeing a "political trial" in the fullest sense, defendants' mock horror at the idea notwithstanding – but the plaintiffs' camp soon realized the truth of the situation: we were facing another hung jury, at best.

At the same time, we knew the Court of Appeals had clearly held, under the rule of *Graham v. Connor,* 490 U.S. 386 (1989), that the forcible infliction of great pain on peaceful protesters as shown here would be unconstitutional if confirmed by a jury; we also knew that, despite this unequivocal decision, defendants still insisted (as they do today) that they cannot lawfully be denied the use of this "tool" of compulsion, if only they express the professional opinion or belief that they need it, and that they were (and are) depending on a jury verdict, excusing them from liability, as a premise to continue its use. And it was this view – and the implicated crossing of the line into the realm of what one of defendants' own minions called, accurately, torture – that the district judge, in his reflections on the trial, unconscionably made his own.

And, it is this constitutionally wrong-headed, partisan view, and the apparent partisan desire to see it vindicated, that caused the judge to outlandishly move the trial to the hotbed of controversy – centered around Earth First!, and the plaintiffs, and their strategy and tactics in the agonizing effort to stop or impede the corporate raiders' slaughter of the redwoods and the whole forest land. And the transfer to Eureka in these circumstances obviously proved to the Court of Appeals that the wrongful, fabricated judgment Judge Walker rendered in 1998 was still with him; or at least, that's the way it *appeared*, from the outlandish transfer. And they were right.

II.

While we are confident the re-transfer and recusal would be affirmed on the merits, we believe the whole

business is out of this Court's purview, a matter of housekeeping within the circuit, and not something the Supreme Court should be concerned with. Certainly, where defendant-petitioners rail on about how unique, ungodly and unprecedented the Circuit Court's action was, there can be little concern that it reflects a growing mischief in the land which must be curbed. Nor is there any other aspect which could lay claim on the extraordinary supervisory interest of the Court, let alone qualify under Rule 10.

Likewise, the defendants clearly have no interest in having their case tried by a particular member of the district bench, where the Court of Appeals has seen fit to make a change; even less are they entitled to one who has made up his mind in advance that they are right, has said so at great length in previously dismissing all claims, and would be likely to withhold, at trial, in their interest, the crucial jury instruction required by the Court of Appeals' interpretation of *Graham v. Connor* in reversing him. With a new judge duly assigned and a new trial date set, defendants' continuing struggle to keep the case before a judge who has shown bias – and keep the trial in a 'company town' – is unseemly, to say the least.

The point is, Judge Walker was roundly reversed, twice, by the court below, and rebuked.[7] The reversal clearly re-affirmed the principle against torturous use of pepper spray, yet, now, the court has found the district

[7] The Court said this Court's words, per Justice Kennedy in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993) "should not be invoked to justify the use of force to effect arrests *in factual circumstances that do not justify the use of force.*" *Headwaters I, supra*, 240 F.3d at 1203 (Emphasis added).

judge *appearing* to implement his wrong, contrary view in another way – by playing for a stacked jury – despite its decision. The Court caught him in a prejudicial act, outside the record, where he had already established his prejudice within it. The remedy was obvious, and was – and in this Court's eyes, respectfully, should be seen as – the Court's own business, a follow-up in an ongoing matter between it and the district judge.

Equally obvious, and significant to the 'mere housekeeping' interpretation – defendants' high dudgeon notwithstanding – is the way the remedy came about: enacted by the same panel, in a summary order, without being offered for *en banc* consideration (where the same had previously been declined on the merits); and without reference to the mooted collateral Order finagled from Judge Hamilton in the district court.[8]

III.

The seriousness of the district judge's transgression of the rule of impartiality in the 1998 Order can scarcely be overstated: he not only improperly weighed the evidence, he made up facts and issues outright – in addition to

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[8] For what it is worth, Judge Hamilton treated the rule discussed in *Liteky* as an absolute, rather than a general rule which allowed for an exception, as in a case like this, and she ignored plaintiffs' contention that the transfer to Eureka was a material and prejudicial application of a categorical bias, shown in the dismissal order. She also pre-empted decision of the claim that the transfer raised an appearance of bias, under 28 U.S.C. § 455, thereby relieving Judge Walker of the obligation under the statute and case law to decide this issue himself, and state his reasons. See defendants' petition, Appendix C and Appendix D; plaintiffs' petition, *post*, App. A, p10.

inverting the position previously forced upon him by the jury splitting four to four. On that occasion he said it was obvious reasonable people could differ. Eight weeks later, he said the precise opposite, *and based it on fabrications*. Why he thought this wouldn't be noticed – or wouldn't be acted upon by the aggrieved plaintiffs – is hard to fathom.[9] The Circuit Court's repudiation of it, however, is plain as a pikestaff, and it is impossible that they did not fathom Judge Walker's prejudice, at that moment, and remember it when plaintiffs' petition was filed. The action he took could have had no other source.

The judge had ruled, after all, in effect, that the swabbing of pepper spray in and around the eyes of unresisting, locked-down protesters was reasonable as a matter of law; that it had been shown to be so by the evidence in the trial – including, willy-nilly, the shocking videotapes of the brutal events. And he had opened his Order with a negation of his earlier mistrial declaration, that reasonable minds could differ about the justification for such bootless, excruciating, police tactics, against young people the police knew to be solemnly pledged to non-violence, engaged in peaceful sit-ins.

Whatever had come over Judge Walker since the trial, to so consolidate his feelings 'against the protesters and in

[9] It was the Court of Appeals that first picked out the judge's earlier statement in the record: "Indeed, the fact that the district judge, after initially declaring a mistrial and ordering a new trial, stated that 'reasonable people can differ' on the use of excessive force in this case speaks directly to the wisdom of our decision now to reverse the court's grant of judgment as a matter of law in favor of the defendants." *Headwaters I, supra*, 240 F.3d at 1206.

favor of the police' – in the wake of a four-to-four split of his jury, *and after seeing the tapes* – he had to know he was wrong to throw the case out, and he distorted the evidence and the record in his order, to cover it up; and he was apprehended by the court below, and his mischief was undone.

This honorable Court would have done the same. It would have seen how the district judge spun a story from the police defendants' absolutist viewpoint, and twisted facts and mis-stated evidence to make it work, in circumstances where, in fact – as the Court of Appeals found – reasonable minds could scarcely differ as to the *un*-reasonableness of swabbing pepper spray juice in the eyes of unresisting demonstrators. This Court would have known – and can see now – that such an Order reflected, precisely, the type of 'antagonism that makes fair judgment impossible'. *Liteky, supra*, 510 U.S. at 555.

Only consider: the judge fabricated an urgent basis for the heinous police action, when there was none; he conjured up a threat from other demonstrators outside, when that wasn't true either; he said this method of 'arrest' was quicker, when it manifestly took much longer; he pronounced it a reasonable "pain compliance" technique, when it did not qualify as such because the pain it causes is uncontrollable;[10] and he pretended the police had no alternative way to arrest the people in the sit-in, when the officers had testified they used grinders "hundreds" of

[10] The Court of Appeals held that pepper spray swabbing was to be distinguished from a 'pain compliance technique', because the pain cannot be immediately relieved when compliance is obtained; quite the contrary. See *Headwaters I, supra*, 240 F.3d at 1200-1201.

times against lockdowns in the past. See, *Headwaters I*, 240 F.3d at 1199-1205; plaintiffs' petition, *post*, at App. A, p8-9, n. 3. The judge synthesized a very false and misleading discourse to support his judgment, much as if he were writing a brief for the cops. And he dismissed out of hand the "transient" pain experienced by the plaintiffs, so great and so gratuitously inflicted that one of the very officers themselves called it torture.

CONCLUSION

In short, Judge Walker showed clearly in the 1998 Order that he had chosen sides against the plaintiffs, and the transfer to Eureka proved he would abuse his power and authority in an attempt to vindicate the police. He was rebuked by the court below for misappropriating the words of this Court. Contrary to the burden of his disquisition, the Circuit Court found that it had been shown, in fact, that " . . . the protesters' conduct [in the sit-ins] posed no danger to themselves or others . . . ", and said the officers' frustration with the lockdown was "irrelevant" under the test for reasonableness in the use of force prescribed by this Court in *Graham v. Connor*; which is certainly correct. In a long opinion which, ironically, was later vacated by this Court for procedural reasons, but then incorporated in the subsequent re-statement, the Court of Appeals spelled out in detail the inversions and perversions of the evidence the district judge had concocted in his Order, and repudiated them soundly. The defendants' second petition for certiorari, challenging those determinations, was denied by this Court. On the

same, underlying merits, if not the failure to meet the threshold jurisdictional requirement, this one should be also.

DATED: February 19, 2004

Respectfully submitted,

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No. _____
(N.D.C.A. Case No. C-97-3989-VRW)

TIME FACTOR: Trial Set For May 12, 2003

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HEADWATERS FOREST DEFENSE

(*Ex. rel.* Vernell "Spring" Lundberg, Noel Tendick, Terri Slanetz, Eric Samuel Neuwirth, Lisa Sanderson-Fox, Maya Portugal, Jennifer Schneider, and Michael McCurdy)

Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA
(Real Parties in Interest: County of Humboldt, Calif., City of Eureka, Calif., Sheriff Dennis Lewis, and Chief Deputy Gary Philp)

Respondent.

PETITION FOR WRIT OF MANDAMUS AND EXERCISE OF SUPERVISORY AUTHORITY

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STATEMENT OF JURISDICTION

This Court's jurisdiction is based on 28 U.S.C. § 1651 F.R.A.P. 21(a).

ISSUES PRESENTED FOR REVIEW

I. Whether the district judge has abused his discretion, and violated plaintiffs' Seventh Amendment right to a fair trial, and Fifth and Fourteenth Amendment right to due process, by *sua sponte* transferring the re-trial from

San Francisco, a neutral place, to Eureka, where there is pervasive hostility toward plaintiffs and their movement?

II. Whether the district judge is biased, and/or appears to be biased against plaintiffs, requiring that the case be reassigned to a different judge?

RELIEF SOUGHT

Petitioners request that this Court issue a Writ of Mandamus, or otherwise intervene and direct the district court to:

1. Return the trial, scheduled to begin May 12, 2003, to the neutral site of San Francisco, where the first trial occurred, the case and all subsequent papers have been filed, and all hearings have been conducted; and

2. reassign the case to a judge other than Judge Walker.

SUMMARY OF THE ARGUMENT

Plaintiff-petitioners are environmental activists who were injured by the cruel misuse of pepper spray by law enforcement officials during a series of anti-logging protests. They seek extraordinary relief from this Court, in order to prevent the impending retrial of their case on May 12, 2003 from becoming an exercise in futility, by virtue of the district court's abuse of discretion in moving the trial from San Francisco to Eureka. There was a hung jury in the first trial in San Francisco – part of a history well known to this Court by way of its double reversal of

the district court, leading to the instant remand.[1] Now, the district judge, the honorable Vaughn R. Walker, plans to hold the re-trial in the very location where the wrongful, essentially sadistic use of pepper spray occurred – a community seething with active, current, overt hostility toward the plaintiffs and their Earth First! colleagues.

Plaintiffs believe there is great likelihood of another hung jury in Eureka; there is also a real threat of dishonest responses from jurors who may seek to help defeat the plaintiffs and/or avoid the disdain of their friends and family who harbor an intense dislike of the plaintiffs and their efforts to protect the Redwoods from clear-cutting. As the Court can see from the eight declarations, fifteen press clippings, two print ads, two press releases, and videotape of a television ad by Pacific Lumber Company equating environmentalists with terrorists, there is in Eureka just now exactly the type of atmosphere which generally prompts courts to move a trial *away* from a particular place. To move a trial *into* such a battle zone is unheard of, and simply unfair. Plaintiffs request that that this Court assert its supervisory authority, in the form of a writ or other direction to the Court below, to prevent a miscarriage of justice, and to keep the district judge from making the retrial a vehicle for vindication of his own viewpoint on the merits of the case.

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[1] See *Headwaters Forest Defense v. County of Humboldt* ("*Headwaters I*"), 240 F.3d 1185, 1209 (9th Cir. 2001), *vacated and remanded*, 122 S.Ct. 24 (2001), with order to conform opinion to *Saucier v Katz*, 121 S.Ct. 2151, 2155 (2001), and conformed in *Headwaters II*, 276 F.3d 1125 (9th Cir. 2002), reversing the district court's grant of qualified immunity to the policymakers and dismissal of the action, and remanding for a new trial.

Plaintiffs do not say this lightly. They have sought recusal of the district judge, on grounds that he has resolutely taken sides against the plaintiffs, and reconfirmed the bias demonstrated in his October 1998 Order dismissing the case, resoundingly reversed by this Court, in two recent decisions: (1) his decision to move the trial to Eureka for no legitimate reason, and (2) his stated intention to present the *thrice-decided* issue of qualified immunity to the jury, despite a total lack of legal authority, inviting jurors to cancel out any finding they might make in plaintiffs' favor. With trial just one week away, the undersigned pray for swift intervention by this Court.[2]

FACTUAL AND PROCEDURAL HISTORY

Factual History

This case arises from the actions of deputy sheriffs at the direction of the two individual defendants, Sheriff Lewis and Chief Deputy Philp, and pursuant to the official policy of Humboldt County and the City of Eureka, in using repeated, violently painful, wholly unorthodox and unprecedented swabbed-on applications of pepper spray base ointment, and spray itself at close range, directly in the eyes and faces of several young, non-violent protesters – who never resisted, and remained in the complete and unchallenged physical control of the police at all times – in prolonged and agonizing attempts to make them unfasten themselves from human chains, constructed by means of

[2] Plaintiffs understand that the relief they seek may cause a delay in the start of trial. However, plaintiffs are willing to suffer such a delay in order to ensure that they receive a fair trial.

metal lockboxes covering their forearms. The sit-ins were part of an intense campaign by the Earth First! movement and various allied groupings in Humboldt County, in the Fall of 1997, protesting the continued heedless "harvesting" of 1000 to 2000 year-old redwood trees on California's North Coast, and a then-pending deal in the U.S. Congress for the supposed preservation of the Headwaters Forest, which actually promised a lingering doom for that last great part of the ancient forest still in private hands.

The metal lockboxes, sometimes called "black bears", had been used in this fashion in the region for several years, and police had developed a familiar methodology for opening them with hard-edged, steel-cutting electric wheels, or "grinders". They could normally disengage the protesters from the boxes in 15 or 20 minutes, sometimes as quickly as five minutes, and routinely used the grinders to end literally dozens of sit-ins, without mishap.

By the Summer of 1997 there had been a series of increasingly effective and visible demonstrations aimed at saving Headwaters from the axe, and a corresponding sharp rise in public attention to the issue. In response, defendants Philp and Lewis developed the idea of smearing pepper spray ointment around the eyes of protesters who would refuse police orders to release themselves from the black bears, and then of refusing to immediately wash the substance away, as a means of forcing them to unlock to seek relief from the pain. Each time, as shown on videotape, officers acting on defendants' orders held back the heads of the plaintiffs, and, sometimes forcing open their eyes with their fingers, used Q-tips to smear the pepper ointment along the crack of the eye and on the skin of the eyelids and eye sockets, whence it sometimes also ran down the face and into the nose and mouth.

Procedural History

Plaintiffs brought suit. The court denied injunctive relief, and granted summary judgment to the underling deputies who carried out the swabbing, finding they were entitled to qualified immunity. At trial, the court further granted immunity to the supervisors, Lewis and Philp, at the close of plaintiffs' case. The jury deadlocked four to four on the liability of Humboldt County and the City of Eureka, and the Court ordered a new trial. Thereafter, however, the Court dismissed the claims against the two entities in October 1998, holding that no reasonable jury could find that the swabbing, etc. violated the Fourth Amendment.

In dismissing the case, the district court said it had concluded "that plaintiffs' claims are legally untenable". It held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs." (October 26, 1998 Order, 1998 WL 754575, *1, *4.) In a strong rebuke, this Court reversed, holding that the district court misapplied the Supreme Court test for excessive force established in *Graham v. Connor*, improperly weighed the evidence against plaintiffs, and erred extensively in stating that plaintiffs had failed to present certain evidence.[3] *Headwaters I*, 240 F.3d at 1197, 1199, 1204-1205.

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[3] In *Headwaters I*, this Court found that the district judge mischaracterized key evidence in his October 26, 1998 Order dismissing the case, i.e.: (1) that the physical intrusion against plaintiffs was minimal, when in fact it created "excruciating pain" (240 F.3d at 1199-1200); (2) that the use of pepper spray was necessary to remove

(Continued on following page)

On certiorari, the U.S. Supreme Court vacated the decision in *Headwaters I*, with instructions to reconsider it in light of *Saucier v. Katz* 533 U.S. 194 (2001). On remand, this Court affirmed its decision and re-ordered the new trial. *Headwaters II*, *supra*.

Plaintiffs retained new trial counsel. At a status conference on January 23, 2003, Judge Walker announced *sua sponte* that he was transferring the trial to Eureka, where there is a federal courtroom, but no regular session, and that he would travel there too and preside at trial. Plaintiffs voiced their concern at the next hearing on March 27, 2003, but the court remained firm. On April 14, 2003, plaintiffs filed a motion to return the trial to San Francisco (Ex. 1), supported by eight declarations (Ex. 2) and fifteen press clippings (Exhibits 3 & 4) describing the bias and hostility currently being directed at environmental activists in and around Eureka.

At the same time, plaintiffs moved for recusal (Ex. 5) on the grounds that the Judge's decision to move the trial to a hostile place, coupled with the clearly erroneous findings he made in his 1998 Order dismissing the case, demonstrate both actual bias and the appearance of bias, under 28 U.S.C. §§ 144 and 455, respectively. Judge Walker had the recusal motion reassigned (April 17, 2003

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plaintiffs quickly from the premises, when the evidence showed that this actually delayed their removal (*id.* at 1201-1202); (3) that the officers made no effort to pry open the eyes of plaintiffs, when in fact the videotapes show they did (*id.* at 1201 n. 9); and (4) that plaintiffs failed to show that defendants had a viable alternative, when in fact plaintiffs showed that defendants could have used the "grinders," as they had done so many times before (*id.* at 1204-1205).

Order, Ex. 6), alerting the new judge that the decision as to any appearance of bias (§ 455) was *his* to make, in keeping with this Court's decision in *In re Bernard*, 31 F.3d 842 (9th Cir. 1994)[4] Judge Phyllis Hamilton received the motion, and ruled against plaintiffs as to both actual bias (§ 144) and appearance of bias (§ 455), ignoring the holding in *In re Bernard*. (April 23, 2003 Order, Ex. 7.)

Thereafter, in a written order dated April 30, 2003, Judge Walker denied plaintiffs' motion to return the trial to San Francisco. (Ex. 8.) In the same Order, he avoided deciding the appearance of bias question which he had indirectly reserved, instead relying on Judge Hamilton's order. (pgs. 15:25-16:5.) This Petition follows.

ARGUMENT

I. THIS COURT SHOULD ORDER THAT THE TRIAL BE RETURNED TO SAN FRANCISCO

A. Plaintiffs have a constitutional right to an impartial jury.

Clearly, plaintiffs are entitled to a fair and impartial jury. *Frank v Mangum*, 237 U.S. 309 (1915); *Moore v Dempsey* (1923) 261 U.S. 86; *Irvin v Dowd*, 366 U.S. 717 (1961); *Rideau v Lousiana* 373 U.S. 723 (1963); *Estes v Texas*, 381 U.S. 532 (1965); *Sheppard v Maxwell* 384 U.S. 333 (1966); *Groppi v Wisconsin*, 400 U.S. 505 (1971); *Pamplin v Mason* (5th Cir. 1966) 364 F.2d 1. Plaintiffs'

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[4] Accord 28 U.S.C. § 455(a), which provides that a judge or magistrate "shall disqualify *himself* in any proceeding in which his impartiality might reasonably be questioned". (Emphasis added.)

right to an impartial jury is "inherent in the [Seventh Amendment] right of trial by jury and is implicit in the requirement of the Fifth Amendment" due process clause. *Kiernan v. Van Schaik*, 347 F. 2d 775, 778 (3rd Cir. 1965).

Historically, federal courts have endorsed changes in the place of trial to protect a litigant from having to brave hostility in the community to the litigant or his or her interests. "As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial." *Pamplin*, 364 F.2d at 5. *Pamplin* also pointed out that the courts must be skeptical to protestations by jurors as to their absence of bias in circumstances where certain community feelings are pervasive. *Id.* at 7.

The Supreme Court has held that a fair trial simply cannot be conducted in a community where a significant segment of that community harbored hostility toward one of the parties. *Groppi v. Wisconsin*, *supra*, 400 U.S. at 509-510; *Irvin v Dowd*, *supra*, 366 U.S. at 728. *Irvin* and *Groppi* made clear that all litigants are entitled to a trial by an "indifferent" jury. A jury drawn from Humboldt and neighboring counties, and seated in Eureka, will be the antithesis of "indifferent".

B. The district court has abused its discretion by relocating the trial from San Francisco to Eureka.

The district court's decision to move the trial, pursuant to 28 U.S.C. § 1404(c), is reviewable for abuse of

discretion. *El Ranco, Inc. v. First National Bank*, 406 F.2d 1205, 1219 (9th Cir.1968), cert. denied 90 S.Ct. 150 (1969).[5] In this case, all of the following facts evidence the court's abuse of discretion: (1) the court plans to move the trial from San Francisco, a neutral place, to a community in which a large percentage of the population is openly hostile toward plaintiffs and their movement; (2) the court has articulated no legitimate reason for relocating the trial, and the one reason it does offer – that the excessive force question should be decided according to a local, community standard – reflects the court's determination to have the jury decide the case based on passion or prejudice, not law; (3) the court has failed to respect plaintiffs' choice to file in federal court *in San Francisco*, rather than state court in Eureka, in order to avoid the prejudice and hostility there; and (4) a jury comprised substantially of residents of Humboldt County would face a financial

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[5] It is not a foregone conclusion that the court was even allowed to act under 28 U.S.C. § 1404(c). Subsection (c) provides, "A district court may order any civil action to be tried at any place within the division in which it is pending." However, as the court acknowledges, the Northern District is not divided into divisions like, for example, the Central District is. (4/30/03 Order, p2:10-27.) Compare 28 U.S.C. §§ 84(a) and 84(c).

Whereas cases within the Circuit have held that § 1404(c) permits a court to move a trial around the district in a state like Nevada or Alaska which only has one district, no case within the Circuit has held that the same applies to a state like California, which has multiple districts. *El Ranco, Inc. v. First National Bank*, 406 F.2d 1205, 1219 (9th Cir.1969) (Nevada); *U.S. v. Rybachek*, 643 F.Supp. 1086 (D. Ala. 1986) (Alaska). To the contrary, at least one case outside the Circuit has held that "Section 1404(c) is clearly inapplicable [where the district] is not subdivided into divisions." *Buchheit v. United Air Lines, Inc.*, 202 F.Supp. 811, 815 (S.D.N.Y. 1962) (Southern District of New York).

conflict of interest in awarding damages to plaintiffs, enhanced by a natural tendency to favor its "home team."

1. Eureka is full of community hostility toward plaintiffs and their interests.

As a result of their work to save California's ancient forests from clear-cutting, plaintiffs and other environmental activists have become the targets of intense hostility in Humboldt County, where the timber business is central to the livelihoods, and the lives, of a high percentage of the population. Eureka is the timber capital of northern California, and the epicenter of the "Timber Wars". Currently, the huge landowner and employer Pacific Lumber, the main object of plaintiffs' protests in this case, is physically (often assaultively) extracting tree sitters from ancient redwood trees, bringing civil "SLAPP" suits against them and their supporters, and running daily radio, television, and print ads which explicitly brand environmental activists as "terrorists", and call on the community to band together in "defense". (See Pacific Lumber press releases, print ads, and videotape of television ad, Exhibits 9 & 11.) Meanwhile, the Humboldt County District Attorney has filed a highly publicized civil fraud suit against Pacific Lumber related to its environmental impact statements, provoking a backlash and recall effort in the community against the D.A. Environmental activists throughout the region face increasing epithets, taunts, threats, and physical violence. Recently, one of plaintiffs attorneys feared for his own safety while representing a tree-sitter during a criminal case in Eureka. (Declaration of Tony Serra, Ex. 2.) The Mayor of Arcata, eight miles northeast of Eureka, characterizes the hostility against environmental activists in the community

as "extreme", and declares that it would be "impossible for [plaintiffs] to receive a fair trial in Humboldt County or anywhere in timber country." (Declaration of Robert Ornelas, Ex. 2.)

The district court concludes that plaintiffs have not demonstrated there is a "wave of public passion" against them in northern California. (4/30/03 Order, pgs. 6:16-24, 8:19-28.) Plaintiffs submit that the court is simply wrong. Moreover, the court has turned a deaf ear to any further proof by declining counsel's offer, at the hearing on 4/24/03, to submit live witnesses who would testify to the hostility. In *Groppi*, *supra*, the Supreme Court took issue with a trial court's similar refusal.

It matters not, as the district judge argues, that this lawsuit directly concerns police practices, not logging. (4/30/03 Order, p5:2-6.) In each case in which the courts have addressed the problem of community hostility and prejudice, the case itself could have been narrowly characterized to make it seem like the hostility was about something else. For example, *Irvin v. Dowd*, *supra*, was about a murder. And *Groppi v. Wisconsin*, *supra*, was about a priest involved in anti-(Vietnam) war demonstrations. The salient factor in all of the cases cited by plaintiffs is the *attitude of the community toward one of the parties*. Thus, the district judge's narrow emphasis on the behavior of the police defendants is misplaced.

Moreover, the police defendants changed their policy and began using swabbed pepper spray on plaintiffs and their associates just as plaintiffs were drawing increasing attention to the rapacious logging practices through their protests. Defendants Lewis at one time worked for Pacific Lumber, and has family working there still. It is likely

that a large number of the prospective jurors summoned from this community will have close, personal ties to the logging industry, and betting otherwise will only make a vain and wasteful exercise of this trial, or worse, irrevocably prejudice plaintiffs, given the pressure to seat a jury anyway.

Nor can the court rely on voir dire to unmask the bias or avert the prejudice. In *Irvin, supra*, the Supreme Court specifically pointed out that jurors' statements of impartiality, as expressed in voir dire in a community where feelings run deep, can be given "little weight". 366 U.S. at 728. Furthermore, as Justice Holmes observed in his dissent in *Frank v Mangum, supra,* "[jurors]....are extremely likely to be impregnated by the environing atmosphere" 237 U.S. at 349. There is a substantial likelihood that voir dire in Eureka will not reveal the true hostility of the community toward plaintiffs. Similarly, voir dire is unlikely to reveal the immense pressure that jurors in Eureka will be under to protect the pecuniary interests of their friends, their family, and their neighbors. *Pamplin, supra,* 364 F.2d at 7. Expecting jurors to resist such pressures is simply unrealistic and, given the availability of San Francisco/Oakland for the re-trial, completely unnecessary.

The case was first tried in San Francisco in 1998. There is no community hostility in San Francisco against any of the parties in this case. No one complained that the jury was infected by bias; yet the excessive force issue was still contentious enough that the jury could not resolve it. Plaintiffs are aware of no case upholding the idea that a trial should be relocated from a neutral place to one which is thoroughly polarized, and hostile – and potentially physically dangerous – toward some of the parties and/or

their attorneys. Certainly, 28 U.S.C. § 1404(c) is not intended to authorize such a transfer. Nor can plaintiffs and their attorneys be expected to concentrate on their work at trial under such circumstances, or if they must seek the protection of U.S. Marshals, as the court's 4/30/03 Order appears to contemplate. (p9:2-12.) This case should no more be tried in Eureka than a civil rights trial in 1965 should have been moved to Selma, Alabama.

2. The court has cited no legitimate reason for the transfer.

Insisting – incorrectly, as shown above – that it has unfettered discretion to transfer the trial to Eureka, and "need not present 'good cause'" (4/30/03 Order, p3:3-14), the court fights shy of adducing any reason for the transfer. The reason the court finally supplies – that excessive force should be judged by a local, community standard – is both legally incorrect and illogical.

Legally incorrect

The court writes that "[t]he community living under the use of force at issue certainly possesses a strong interest in considering the reasonableness of the practice, and it is appropriate to submit the question to a jury drawn from that community for determination," based on its own "conscience" and "community judgment." (Order, p12:13-21). The court cites two district court cases from other Circuits: But it is well-settled that excessive force is judged by an objective standard. *Graham v. Connor*, 490 US 386, 397 (1989); *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir.1994). The cases cited by the court do not say otherwise. In *Bennett v. Murphy*, 127 F.Supp.2d 689, 690 (WD

Pa 2000), a pre-*Saucier v. Katz* excessive force case, the court found, as this court had in *Headwaters I*, that the police officer defendant was not entitled to qualified immunity because the reasonableness inquiry was the same as the question on the merits, and thus for a jury to decide. The *Bennett* court held that the "standard of reasonableness . . . should emerge from the conscience of the community, not the mind of a single judge." Thus, the court used the term "community" to distinguish a group of jurors from a single judge, but did not opine on the scope of community. 127 F.Supp.2d at 690.

In *Wells v. Smith*, 778 F.Supp.7, 8 (D. Md. 1991), the court barred expert testimony on the question of what constituted excessive force, on the grounds that it would not be helpful to the trier of fact, per F.R.E. 702, which must decide excessive force based upon its "common sense and community sense." 778 F.Supp. at 8. Once again, the court did not opine on the scope of community.[6]

Illogical

In the case at bar, the court takes great pains to show that the Eureka session is ostensibly part of the San Francisco/Oakland "division" (though 28 U.S.C. § 84(a) does not say so), and that the venires for the two courthouses substantially overlap. (Order, pgs. 4:10-27, 11:9-12.) One is

[6] The court also spends considerable time in its order extolling the civics opportunity which will be created for a Northern California jury by moving the case to Eureka. (Order, p11.) But plaintiffs' constitutional and concrete right to a fair trial and impartial jury can hardly be offset by the abstract value which might accrue to prospective jurors summoned in Northern California.

forced to wonder, therefore, what different community standard the court has in mind, except for one which it knows will be infected with bias against plaintiffs.

It is also revealing of the district judge's biased motive that he continues to cast about for a justification for the transfer, after originally suggesting that it was simply because the jury in San Francisco had deadlocked. Plaintiffs are not aware of any case which supports such a reason for relocating a trial. Nor has the court substantiated such a reason. Moreover, the logic is counter-intuitive. Jury deliberations inflamed by passion and prejudice increase, not decrease, the likelihood that the jury will deadlock.

3. Plaintiffs' choice of forum is entitled to respect.

While moving the trial to Eureka does not constitute a change of venue, plaintiffs' choice of a federal forum *in San Francisco* is nevertheless entitled to respect.[7] In electing to file their action in federal court, plaintiffs specifically declined to pursue their case in Eureka. Their choice is consistent with the basic purpose of Section 1983 of the Civil Rights Act, which was to provide a federal forum for civil rights claims, often remote from the community where the violation occurred. See, e.g., *Mitchum v. Foster*,

[7] In its 4/30/03 Order, the district court sets up a straw man argument about venue, to hold that "plaintiffs' motion to 'change venue' is denied." (p2:25-26.) Plaintiffs never brought a change of venue motion. Venue is not the issue. The issue, rather, is plaintiffs' fundamental rights to an impartial jury, and an impartial jurist.

407 U.S. 225 (1972).[8] Plaintiffs did not, and *could not*, have filed their federal action in Eureka. Under Civil Local Rule 3-2(d), "All civil actions which arise in the count[y] of . . . Humboldt . . . *shall* be assigned to the San Francisco Division or the Oakland Division." (Emphasis added.)[9] For these reasons, and by analogy to the cases on venue, plaintiffs' choice to file their action in federal court, and thereby avoid the hostility against them in Eureka that would have attended a state-court trial, is entitled to respect.[10]

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[8] "Proponents of [§ 1983] noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Mitchum*, 407 U.S. at 240-242.

[9] As the court observes, the Local Rules use the term "division" for administrative convenience; it does not have statutory significance. (4/30/03 Order, p2:20-23.)

[10] "[T]here is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). "[U]nless the balance [of private and public interest factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). There is a "strong presumption" in favor of a plaintiff's choice of forum. *Royal Queentex v Sara-Lee*, 2000 WL 246599 *2 (Judge Jenkins), cited with approval by Judge Walker in *Williams v Bowman*, 157 F.Supp.2d 1103, 1106 (2001). In *Williams*, Judge Walker himself noted that "substantial deference" should be given to plaintiff's choice of venue, and that the "moving party" carries the burden of establishing that any transfer is appropriate. *Id.* at 1107.

4. Jurors from in and around Humboldt County would face a fiscal conflict of interest.

It seems clear that jurors from in and around Humboldt County would be reluctant to find for plaintiffs because, given the relatively small county budget (further depleted by the economic downturn), they would effectively have to pay plaintiffs' damages and attorneys' fees themselves. Various courts have found that change of venue is appropriate in such circumstances. See, e.g., *Berry v North Pine Elec. Co-op*, 50 NW2d 117 (Minn. 1951); *Board of Public Instruction v First National Bank*, 111 Fla 4 (Fla. 1932); *Brace v Steele County*, 78 ND 429 (N.D. 951); *Linington v McLean County*,150 NW2d 239 (N.D. 1967); *Brittain v Monroe County*, 214 Pa 648 (Pa 1906). The case cited by the district court, *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1400 (9th Cir. 1984), is distinguishable because it involved a much larger county, with a vastly larger budget, than Humboldt County.

II. THIS COURT SHOULD ORDER THAT THE CASE BE REASSIGNED TO A DIFFERENT JUDGE, IN ORDER TO CURTAIL THE BIAS AGAINST PLAINTIFFS, AND TO FORESTALL ANOTHER APPEAL AND A THIRD TRIAL

The district court's bias has become increasingly apparent, as shown by this highly prejudicial transfer of the case, which can have no rational purpose except to ensure plaintiffs' defeat, and to vindicate the court's 1998 Order of dismissal. Specifically, the district judge has (1) relocated the trial from neutral ground, to a place which is overtly hostile toward plaintiffs and their interests,

without any legally sufficient justification; (2) plainly ignored General Order 44(E)(3), requiring random reassignment to another judge in such circumstances;[11] and (3) strained to preserve some means to award qualified immunity to defendants, by submitting the question to the jury, despite the fact that this Court has already firmly decided qualified immunity against defendants, and there is no legal or rational basis for submitting the question to the jury.[12] (See Plaintiffs' submissions re qualified immunity, and the district court's 4/28/03 Order, Ex. 10.)

While it is true that recusal is ordinarily reserved for situations in which "bias stems from 'extrajudicial source[s] and not from a judge's conduct or rulings during the course of judicial proceedings," *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 998-999 (9th Cir. 2003) (internal quotes and cites omitted), recusal may be appropriate in a case,

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[11] General Order 44(E)(3) provides: "Whenever a civil or criminal case is transferred from one Courthouse of the Court to another, the Clerk shall randomly reassign the case to a Judge designated to hold court at the receiving Courthouse." (G.O. No. 44, "Assignment Plan", amended through 1/30/03.) The Court's failure to direct the clerk to randomly reassign the case is a flagrant abuse of discretion, and further evidence that the district judge has its own agenda in remaining on this case. Why else would the court ignore such a clear rule, raised by plaintiffs both in their motion, and at oral argument? Notably, the court does not say a word about General Order 44(E)(3) in its Order of 4/30/03.

[12] In its Model Civil Jury Instructions, this Court does not provide a qualified immunity instruction, but rather makes clear that qualified immunity is only for a jury to consider in a rare case, where an issue of fact prevents the court from determining qualified immunity. No. 11.3 (Comment Only). Such is not the case here, where both the district court and this Court have decided qualified immunity against defendants, and no purpose could be served by submitting this vexing legal question to the jury, after a trial has been had.

such as this one, where the bias and/or appearance of bias is apparent within the four walls of the case by the rulings and/or statements of the judge.

Indeed, the district court's bias first began to emerge in 1998, when it dismissed the municipal entities, and granted qualified immunity to the commanders, Sheriff Lewis and Chief Deputy Philp. The court held that the "uncontroverted evidence presented at trial unequivocally supports the conclusion that the officers acted reasonably in using OC [pepper spray] as a pain compliance technique in arresting plaintiffs," 1998 WL 754575, *4. In reversing and remanding for a new trial, this Court strongly rebuked the district court, finding that it had misapplied the Supreme Court test for excessive force established in *Graham v. Connor*, improperly weighed the evidence against plaintiffs, and clearly erred in stating that plaintiffs had failed to present certain evidence, which they clearly presented. *Headwaters I*, 240 F.3d at 1197, 1199, 1204-1205. (See footnote 3, supra.)

CONCLUSION

For all the foregoing reasons, and in order to conserve everyone's resources and to ensure that plaintiffs receive a fair trial by an impartial jury, plaintiffs ask this honorable Court to issue a Writ of Mandamus or other supervisory order directing the district court to (1) return the trial to the neutral place of San Francisco, and (2) reassign the case to a judge other than Judge Walker for trial.

Respectfully submitted,

DATED: May 6, 2003:

Ben Rosenfeld
Robert Bloom
Dennis Cunningham
William Simpich
J. Tony Serra
Brendan Cummings
Attorneys for Plaintiff-Petitioners

CERTIFICATE OF SERVICE

I certify that I served the within Petition for Writ of Mandamus and Exercise of Supervisory Authority on the respondent, Honorable Vaughn R. Walker, U.S. District Court Judge, Northern District of California, by delivering a true copy to the Clerk's Office, in an envelope addressed to Judge Walker, and on the real parties in interest, defendants in the underlying case, by emailing, and thereafter mailing a true copy to their attorneys of record, Nancy Delaney and William Mitchell, at their office at 814 7th Street, Eureka, CA 95501, on May 6, 2003.

Ben Rosenfeld

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

I certify that the within Petition is proportionately spaced, has a typeface of 14 points, and contains 5,335 words.

Ben Rosenfeld

(3)

No. 03-1032

IN THE

SUPREME COURT OF THE UNITED STATES

COUNTY OF HUMBOLDT, *et al.*,

Petitioners,

v.

HEADWATERS FOREST DEFENSE, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY
AND
MOTION FOR SUMMARY DISPOSITION

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PETITIONERS' REPLY AND MOTION FOR SUMMARY DISPOSITION

MOTION FOR SUMMARY DISPOSITION (Rule 16.1)

Under Supreme Court Rule 16.1, based upon the *Petition for Writ of Certiorari, Respondents' Brief in Opposition* and *Petitioners' Reply and Motion for Summary Disposition* submitted herewith, defendants move for an order of summary disposition on the merits, reversing the order of the Ninth Circuit and reinstating the District Court orders denying recusal (Petition, Appendix D) and denying change of situs of trial (Petition, Appendix E).

REPLY BRIEF

OVERVIEW – QUESTION REVISITED

As now distilled by plaintiffs' opposition, the question is: Do parties to a federal proceeding have a right to a fair trial under accepted rules of jurisprudence, or should the federal court system become a forum for political theatre?

I.
THE OPPOSITION CONFIRMS THAT THE NINTH CIRCUIT'S WRIT WAS AN UNPRECEDENTED DEPARTURE FROM WELL-ESTABLISHED FEDERAL JURISPRUDENCE.

As set forth in the Petition for Writ of Certiorari, the issuance of a writ to recuse a district court judge based on

a judicial ruling represents a completely unprecedented departure from established federal jurisprudence. It has been held time and time again that, without something more, judicial rulings cannot support recusal.

Plaintiffs' opposition offers no authority or even argument to the contrary. The only authority cited in the opposition on the issue of recusal is this Court's decision in *Liteky v. United States,* 510 U.S. 540 (1994). *Liteky* provides absolutely no support for the Ninth Circuit's unprecedented recusal order. The *Liteky* court unanimously agreed that neither the admonitions nor trial rulings below provided sufficient grounds for disqualification of the district court judge. Although the court left open the possibility that "in the rarest circumstances," a judicial ruling could provide the basis for recusal, a ruling must "display deep-seated and unequivocal antagonism that would render fair judgment impossible." To illustrate such a circumstance, the court cited a statement by a district court judge in a World War I espionage case that "one must have a very judicial mind, indeed, not [to be] prejudiced against the German-Americans" because their "hearts are reeking with disloyalty." *Id.*, at 555.

Liteky instructs that "bias or prejudice" connotes "a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess. . . or because it is excessive in degree." *Id.*, at p. 550.

Plaintiffs offer not one scintilla of evidence which would support a claim that Judge Walker's decision to hold trial in Eureka, where virtually all of the parties reside and the incidents occurred, demonstrated bias or

prejudice, let alone "deep-seated favoritism or antagonism." Nor do plaintiffs take issue with Judge Hamilton's independent review of plaintiffs' recusal motion, and the failure of the panel to consider that decision below, which states: "Plaintiffs provide no evidence of any deep-seated favoritism or antagonism that stems from an extrajudicial source, and have not established that there is a reasonable question as to whether Judge Walker has a wrongful or inappropriate predisposition toward plaintiffs." Nor do plaintiffs challenge or question Judge Walker's complete discretion under 28 U.S.C. § 1404(c) to order the action to be tried "at any place within the division in which it is pending."

The complete failure of plaintiffs' opposition to cite any evidence or authority which would call into question the appropriateness of Judge Walker's order confirms that it cannot possibly provide the basis for recusal.

Similarly, plaintiffs' opposition provides nothing which would excuse the panel's disregard for well-established mandamus review standards. Indeed, plaintiffs acknowledge that the panel issued its writ "in violation of normal rules governing grants of extraordinary relief. . ." Opposition, p. 10. Plaintiffs do not take issue with the legion of cases holding that mandamus is a "drastic" and "extraordinary" remedy requiring the moving party to satisfy the burden of showing a "clear and undisputable" error. That the panel ignored this standard is clear on the face of the memorandum decision, which assigns no legal error whatsoever to any decision by Judge Walker.

Rather than providing legal or evidentiary support for the merits of the panel's recusal writ, plaintiffs attempt to down-play the writ as an "administrative" or "mere housekeeping" matter. Opposition, pp. 6, 13. As instructed by this Court, the rigorous standards applied to

writs are served by "the undesirability of making a district court judge a litigant and the inefficiency of piecemeal appellate litigation." *Mallard v. United States,* 490 U.S. 296, 309 (1989), citing *Kerr v. United States,* 426 U.S. 394, 402-403 (1976), *Applied Chemical Corp. v. Diaflon, Inc.,* 449 U.S. 33, 35 (1980).

The complete and total usurpation of Judge Walker's unquestioned authority to hold the trial in Eureka by the panel order issued three days before trial, and the subsequent writ to recuse Judge Walker cannot reasonably be characterized as a "mere housekeeping" matter.[1]

II.
THE OPPOSITION CONFIRMS THAT THE WRIT BELOW ADVANCES PLAINTIFFS' BLATANTLY POLITICAL AGENDA.

The beginning and end of the legal issue in this case is whether or not law enforcement officials authorized the use of reasonable force under Fourth Amendment standards to overcome resistance to lawful arrests. In spite of this uncontrovertable state of affairs, plaintiffs continue to attempt to manipulate the judicial process to serve their openly political agenda.

The opposition confirms plaintiffs' intent to stage a "political trial," and their desire for an "international forum" in San Francisco. Opposition, p. 5. The opposition

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[1] The claim of plaintiffs that defendants "have managed to pointlessly and expensively drag out the proceedings in two courts below for years" is curious given that this case entered the appellate arena by plaintiffs' appeal following trial, and again following plaintiffs' petition for writ of mandamus to recuse Judge Walker, filed six days before commencement of the second trial.

goes so far as to state that the underlying "strategy and tactics" of the plaintiffs is "to stop or impede the corporate raiders slaughter of the redwoods and the whole forest land."[2] Opposition, p. 11.

The opposition confirms that plaintiffs' refusal to submit to lawful arrests in the underlying incidents was staged in furtherance of the openly political EarthFirst! movement. Opposition, p. 4.

These admissions underscore the misappropriation of judicial process in this litigation, which has now resulted in the unprecedented recusal of a district court judge and transfer of this case to plaintiffs' chosen "international forum."

Following trial, in the order granting defendants' Rule 50 motion, Judge Walker correctly noted that, in each incident, "plaintiffs were part of a large group of protesters operating in an organized and concerted effort..." In analyzing the governmental interests at stake, the district court invoked *Bray v. Alexandria Women's Health Clinic*, 406 U.S. 263 (1993), which states that "the wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protests, organized, premeditated lawlessness menaces in a unique way the capacity of a

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[2]It is the position of plaintiffs that is an affront to the First Amendment – the notion that their cause entitles them to special treatment by law enforcement and justifies making a "Big Top" out of a federal forum. Defendants would also (see Opposition, p. 7, fn. 3) welcome an opportunity to submit videotapes of the entire incidents for review by this Court. Defendants remain confident that a jury will determine that the transient discomfort of pepper spray presents a far more reasonable alternative to overcome plaintiffs' resistance to lawful arrests than requiring officers to risk injury to plaintiffs and themselves by cutting through twenty-five pounds of steel encasing a human limb.

State to maintain order and preserve the rights of its citizens." *Id.*, at p. 287.

In appealing the Rule 50 order, plaintiffs downplayed the governmental interests involved by claiming that there was no evidence that the incidents were part of a large-scale protest. This characterization was adopted by the Ninth Circuit panel in reversing the district court. See, *Headwaters Forest Defense v. County of Humboldt,* 240 F.3d 1185, 1201 (9th Cir. 2000) (". . . there is no evidence supporting the notion that the police needed to use pepper spray in this case to 'maintain order and preserve the rights of its citizens' against a 'large group' of 'lawless' and 'menacing' protesters." Quoting, *Bray,* 506 U.S. at 287.).

The opposition here now makes it abundantly clear that the district court accurately characterized the circumstances facing law enforcement and exposes the previous efforts by plaintiffs to mislead the appellate court.[3]

Plaintiffs have thus far succeeded in holding law enforcement officials hostage for five years in what can fairly be described as a propaganda suit. If the Ninth Circuit's recusal writ is allowed to stand, a district court judge will fall victim to the same abuse of the judicial process.

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[3] Reiterating the panel's parroting of the statement of plaintiffs that the trial situs choice was made *sua sponte* is yet another example of this. Plaintiffs' counsel acknowledges being new to the case. Opposition, p. 10. Defendants' counsel provided a sworn declaration regarding the efforts to arrange for trial in Eureka before the *first* trial. Petition, Appendix D, pp. 12a-13a, fn. 3. No suggestion to the contrary has been heard from the attorneys representing plaintiffs at that time.

III.
SUMMARY REVERSAL IS WARRANTED.

Defendants are keenly aware that circumstances warranting the expenditure of this Court's resources to correct erroneous appellate decisions are exceedingly rare. Nevertheless, defendants submit that the writ of mandamus issued below has "so far departed from the accepted and usual course of judicial proceedings" as to warrant this Court's supervisory power pursuant to Rule 10.

Furthermore, it is respectfully submitted that this is also a case warranting a summary reversal pursuant to Rule 16. See, e.g., *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (granting summary reversal and stating that "summary reversal does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law."); *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987) (granting summary reversal, explaining that the fact that the Court of Appeals' opinion was unpublished, and apparently of no precedential effect, "carries no weight in our decision to review the case."); *Hetzel v. Prince William City*, 523 U.S. 208 (1998); *U.S. v. Indrelunas*, 411 U.S. 216, 218 (1973) ("consideration of the petition for certiorari and the response has led us to conclude that further briefs and oral arguments would not materially assist in our disposition of the case. . ."); *Stewart v. LaGrand*, 526 U.S. 1001 (1999); *Mazurek v. Armstrong*, 520 U.S. 968, 974 (1997) (stating that "the court of appeals' decision is also contradicted by our repeated statements in past cases – none of which was so much as cited by the court of appeals, despite the district court's discussion of two of them – that the performance of abortions may be restricted to physicians."); *County of Los Angeles v. Kling*, 474 U.S. 936 (1985) (summary reversal of un-

published, non-citable opinion); *Stone v. Graham*, 449 U.S. 39 (1980); *Idaho Dep't of Employment v. Smith*, 434 U.S. 100 (1977); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975).

The justification for summary reversal is supported not only by the degree of departure from established jurisprudence on the merits, but also by the Ninth Circuit panel's use of an unpublished memorandum and its subsequent refusal to circulate the decision for *en banc* consideration. By its very nature, the issuance of a writ of mandamus is a drastic judicial remedy, intrinsically warranting evaluation and review. The issuance of a writ to recuse a district court judge should only heighten the justification for not only a published opinion, but *en banc* consideration. The opinions of federal courts "should contain reasoned explanations of their decisions to lend them legitimacy, permit public evaluation, and impose a discipline on judges." Wald, P., Judge, United States Court of Appeals for the District of Columbia Circuit, The Problem With Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?, 42 Md. L. Rev. 766. Unpublished memorandum decisions "should be reversed for cases in which the issues involve the application of existing rules of law to a standard fact situation, and in which there is no reason for qualifying the settled rules." *Id.* See also, Mandell, J., Trees That Fall In the Forest: The Precedential Effect Of Unpublished Opinions, 34 Loy. L. A. L. Rev. 1255.

The issuance of an order halting an imminent trial and subsequent writ removing a District Court Judge cannot be fairly described as a "standard fact situation." As set forth in defendants' Petition, a review of the entire history of judicial decisions reveals that no judge has

ever been removed from a case because of a judicial ruling. These unprecedented judicial actions warranted exposure and evaluation by way of a published opinion. It is telling that the panel chose to withhold the writ from publication and *en banc* exposure when all of the panel's previous decisions in this case have been published and circulated for *en banc* consideration.

The use of unpublished memorandum decisions to decide important or controversial issues threatens the integrity of the judicial process and tempts abuse. See e.g., *Kling*, 474 U.S. at 938 (Stevens, J., dissenting) ([The Ninth Circuit's] decision not to publish [its] opinion or permit it to be cited – like the decision to promulgate a rule spawning a body of secret law – was plainly wrong."); *U.S. v. EDG Broadcasting Company*, 509 U.S. 418, 424, n. 3 (1990) ("We deem it remarkable and unusual that although the Court of Appeals affirmed a judgment that an Act of Congress was unconstitutional as applied, the court found it appropriate to announce its judgment in an unpublished *per curiam* opinion."); Mandell, J., 34 Loy. L. A. L. Rev. at 1264 ("The prospect of judges exercising broad discretion under the auspices of limited publication in order to sweep difficult issues under the rug by inappropriately designating an opinion unpublished is frightening,"); Posner, R., The Federal Courts, Crisis and Reform 122 (1985) (Noting that "the unpublished opinion provides a temptation for judges to shove difficult issues under the rug, in cases where a one-liner would be too blatant an evasion of judicial duty").

CONCLUSION

For all of the above reasons, petitioners submit that the panel's order warrants supervisory intervention by this Court, and specifically request that the Court (1) grant certiorari, (2) summarily reverse the order of the Ninth Circuit panel,and (3) reinstate the District Court orders denying recusal (Petition, Appendix D) and change of situs of trial (Petition, Appendix E).

Respectfully submitted,

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March 1, 2004